

## **Part 315 – Tribal Ancestral Lands Consultation Under the National Historic Preservation Act – Guidance for Natural Resources Conservation Service Employees**

### **Subpart B – Exhibits**

#### **315.20 Exhibit 1 – Definitions**

Below are terms commonly used when engaging with Indian Tribes in the section 106 process. These terms come from NRCS, U.S. Forest Service (FS), Advisory Council on Historic Preservation (ACHP), National Park Service (NPS), and the Bureau of Indian Affairs (BIA) resources.

**Allotted Lands (Off Reservation).**—Public domain lands set aside to fulfill a need to maintain recognition of a specific group of Indian people. These are sometimes called “Public Domain Allotments.” Nearly all these acres are held in trust status by the Department of the Interior (DOI), and administered by the BIA. (FS 1997)

**Allotted Lands (On Reservation).**—The Dawes Act, or General Allotment Act, (1887) provided for dividing reservations into separate parcels to encourage individual Indians in agricultural pursuits. Parcels were 160 acres for each family or 80 acres per single person. Any remaining acres over the population allocation were deemed “surplus” and opened up for settlement by non-Indians. Under the Act, Indian-held lands declined from 138 million acres in 1887 to 48 million acres in 1934. In 1934, the Dawes Act was superseded by the Indian Reorganization Act. (FS 1997)

**Ancestral Lands.**—May include Indian lands, Indian country, and ceded lands as defined above. For the purposes of ancestral lands consultation, the NRCS defines this to mean the areas, whether discrete or continuous, where Tribal groups or their members have been affiliated with that have cultural, historical, spiritual, subsistence, and/or ceremonial significance to a Tribe. An Indian Tribe’s physical connections to these areas may or may not persist into the modern era; an ongoing physical connection to an area is not required for a site to have religious and cultural significance to a Tribe. Ancestral lands are defined by Indian Tribes based on their knowledge of their history and ongoing connections with that area.

**Ceded Lands.**—First used in the Treaty with the Wyandot, 1789. Since that time, many treaties have referred to land cessions made by Indian Tribes to the United States. Most Federal agencies and Indian Tribes prefer to use the term “ceded lands” when describing areas where an Indian Tribe did “cede, relinquish, and convey to the U.S. all their right, title, and interest in the lands and country occupied by them” at treaty signing or when reservations were established. Ceded land references are qualified by the legal definition of original Tribal occupancy issued in 1978 by the U.S. Court of Claims. In effect, “only lands actually owned by a Tribe can be ceded to the U.S.” This term is used interchangeably with “treaty boundary.” (FS 1997)

**Dependent Indian Communities.**—The U.S. Supreme Court decision in *Alaska v. Native Village of Venetie Tribal Government* (522 U.S. 520 (1998)), held that “dependent Indian communities” refers to a limited category of Indian lands that are neither reservations nor allotments and that must satisfy two requirements: first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under Federal superintendence. (ACHP 2013)

**Fee Title (Fee Simple Title).**—Absolute ownership of a land area unencumbered by any other interest or estate. (FS 1997)

Indian Country.—(a) All land within the limits of any Indian reservation under jurisdiction of the U.S. Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State; and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. (18 U.S.C. Sec. 115)

Indian Land.—(a) All land within the exterior boundaries of any Indian reservation, and (b) all dependent Indian communities. (54 U.S.C. Sec. 300319)

Concerning the definition of Indian land, the NPS has, in their proposed rule (36 CFR Sec. 61.8–9) for the Certification of Tribal Historic Preservation Officer Programs, provided further guidance on the interpretation of this.

- First, within the boundaries of the existing reservation, the ownership status of the land makes no difference. An Indian Tribe would assume jurisdiction for this program everywhere within the reservation boundaries.
- Second, this definition differs substantively from the definition of “Indian Country” found elsewhere in Federal statute. Specifically, this definition of Tribal lands does not include individual allotments held in trust outside existing reservation boundaries. Legal guidance issued to the NPS specifies that an Indian Tribe may not assume responsibility for NHPA historic preservation responsibilities on individual allotments outside reservation boundaries.
- Third, in contrast to individual allotments, legal guidance affirms that lands held in trust for the benefit of an Indian Tribe outside an existing reservation do fall within the meaning of Tribal lands for the purposes of the NHPA. It, therefore, qualifies as “Tribal lands” over which the THPOs may assume NHPA historic preservation responsibilities.
- Finally, legal guidance to NPS indicates that lands outside an existing reservation that are owned by an Indian Tribe in fee simple but not held in trust are not dependent Indian communities and so are not Tribal lands for the purposes of this program. (36 CFR Pt. 61, RIN 1024-AC79)

Indian Tribe.—An Indian Tribe, band, nation, or other organized group or community, including a Native village, regional corporation, or village corporation (as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. Sec. 1602)), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (36 CFR Sec. 800.16(m), 54 U.S.C. Sec. 300309). Indian Tribes are commonly referred to as a “federally recognized Indian Tribes.”

Nonfederally Recognized Indian Tribes.—Also called nonfederally recognized groups, State-recognized Indian tribes, and unrecognized tribal groups. These are groups who are not eligible for the special programs and services provided by the United States. Some nonfederally recognized Indian Tribes are groups that were once recognized prior to the termination era and other groups are seeking recognition. While nonfederally recognized Indian tribes do not have a statutory right to be consulting parties in the section 106 process, the agency may invite them to consult as an “additional consulting party” as provided under the ACHP’s regulations at 36 CFR Section 800.2(c)(5), if they have a “demonstrated interest.” (ACHP 2012)

Treaty Rights.—From 1778 to 1871, the United States’ relations with individual American Indian nations indigenous to what is now the United States were defined and conducted largely through the treaty-making process. These “contracts among nations” recognized and established unique sets of rights, benefits, and conditions for the treaty-making Indian Tribes who agreed to cede millions of acres of their homelands to the United States and accept its protection. Like other treaty obligations of the United

States, Indian treaties are considered to be “the supreme law of the land,” and they are the foundation upon which Federal Indian law and the Federal Indian trust relationship is based. (DOI BIA)

**Tribal Sovereignty.**—Refers to an Indian Tribes’ right to govern themselves, define their own membership, manage Tribal property, and regulate Tribal business and domestic relations; it further recognizes the existence of a Government-to-Government relationship between such Indian Tribes and the Federal Government.

## REFERENCES

Advisory Council on History Preservation (ACHP). 2013. Role of the Tribal Historic Preservation Officer in the Section 106 Process. <http://www.achp.gov/docs/Role%20of%20the%20THPO.pdf>

ACHP 2012. Consultation with Indian Tribes in the Section 106 Review Process: A Handbook. <http://www.achp.gov/pdfs/consultation-with-indian-tribes-handbook-june-2012.pdf>

U.S. Forest Service 1997. National Resource Guide to American Indian and Alaska Native Relations (FS-600, Appendix B). <http://www.fs.fed.us/people/tribal/>

U.S. Department of the Interior (DOI) Indian Affairs (BIA) web page. Frequently Asked Questions. <http://www.bia.gov/FAQs/>

### 315.21 Exhibit 2 – Identifying Affiliated Indian Tribes

Understanding who to contact as part of the section 106 process is essential. Indian Tribes must be contacted during the course of your consultation process. Identification of interested Indian Tribes, and the areas they claim, is not always a simple task. States occupy a static territory with defined boundaries; their rights do not extend beyond their borders into other States. Indian Tribes can have static land bases as well, but they can also have legal rights and the rights to participate in statutory processes on lands not under their direct control.

Listed below are a series of resources that can help identify Indian Tribes that may have an affiliation to an area where the NRCS has an undertaking. It is important to note that none of these resources claim that they were developed in conjunction with Indian Tribes. The extent of an Indian Tribe’s ancestral lands must either be developed by, or in conjunction with, that particular Indian Tribe.

The ACHP stresses that documentary or other sources of information that do not clearly support an Indian Tribe’s assertions should not be used to deny an Indian Tribe the opportunity to participate in consultation. A common misunderstanding is that an Indian Tribe needs to document its ties to historic properties in the area of the undertaking. Instead, the NHPA requires agencies to consult with any federally recognized Indian Tribe that attaches religious and cultural significance to a historic property.

#### Resources:

- Library of Congress.—This link provides maps of the land cessions made by American Indian Nations during the interval between the formal establishment of the United States and 1894. These are the same maps utilized by the NPS NAGPRA database. <http://memory.loc.gov/ammem/amlaw/lwss-ilc.html>
- NPS Databases.—The NPS’s NAGPRA division has developed a series of web pages that contain both Indian land cession and Indian Claims Commission information and the maps.
  - Indian Tribes associated with Indian land cessions that occurred between 1784–1894.
    - Table [https://www.nps.gov/nagpra/ONLINEDB/Land\\_Cessions/INDEX.HTM](https://www.nps.gov/nagpra/ONLINEDB/Land_Cessions/INDEX.HTM)

- The Indian Claim's Commission was established by Congress in 1946 to settle land claim disputes between Indians and the U.S. Government. The following maps are based on information provided by the Indian Claims Commission:
  - Map <https://www.nps.gov/nagpra/DOCUMENTS/ClaimsMAP.htm>
  - Index <https://www.nps.gov/nagpra/DOCUMENTS/ClaimsMapIndex.htm>
- USFS.—The FS Indian Lands Map Viewer is designed to show Indian lands in relation to National Forest System boundaries for general comparison purposes only. Historical Indian cessation maps are also depicted to informally give an overview of Indian land cessations. <http://usfs.maps.arcgis.com/apps/webappviewer/index.html?id=fe311f69cb1d43558227d73bc34f3a32>
- Native Languages Interactive Map.—This site contains an interactive map of the United States. Click on a State and a graphic appears depicting Tribal groups who, according to their research, occupied these areas. <http://www.native-languages.org/states.htm>.
- Tribal Directory Assessment Tool (TDAT).—The U.S. Department of Housing and Urban Development tool to help identify Indian Tribes and Tribal contact information to assist in the consultation process. <https://egis.hud.gov/tdat/>.
- Britannica.—The Britannica encyclopedia has a series of regional maps with names of Indian Tribes placed on it. These maps represent the approximate locations that many Indian Tribes traditionally inhabited according to their research. <http://www.britannica.com/topic/Native-American>
- Maps of Current Indian Reservations.—Two map resources for identifying the locations of current Indian reservations in the United States.
  - The BIA is the agency responsible for maintaining up-to-date information. <http://www.bia.gov/cs/groups/public/documents/text/idc013422.pdf>

SHPOs are also a useful resource. SHPO offices work in coordination with section 106 undertakings and agreement documents related to those undertakings that often provide for and lead to many long-term consultations directly with federally recognized Tribal Governments. Many SHPOs provide pertinent information, statewide preservation plans, and in some cases, suggested guidance underscoring Federal agency responsibilities under section 106 and the requirement to consult with certain Tribal Governments within the State.

Other Federal and State agencies that have a long history of working with Indian Tribes are also an invaluable resource. Many agencies may have lists of contacts, agreement documents, information from past meetings, and other information that can assist NRCS in their consultation requirement.

Note: Indian Tribes may have their own databases of sites of religious and cultural significance.

## References

ACHP 2012. Consultation with Indian Tribes in the Section 106 Review Process: A Handbook. <http://www.achp.gov/pdfs/consultation-with-indian-tribes-handbook-june-2012.pdf>

## 315.22 Exhibit 3 – Points of Contact Resource List

Knowing who to contact within a Tribal organization is important when conducting section 106 consultation. Because many projects are time sensitive, it is also important to include Indian Tribes in the early stages of planning as directed in the NHPA's implementing regulations. More importantly, early coordination can benefit both the Indian Tribe and the applicant in achieving their desired goals in this process.

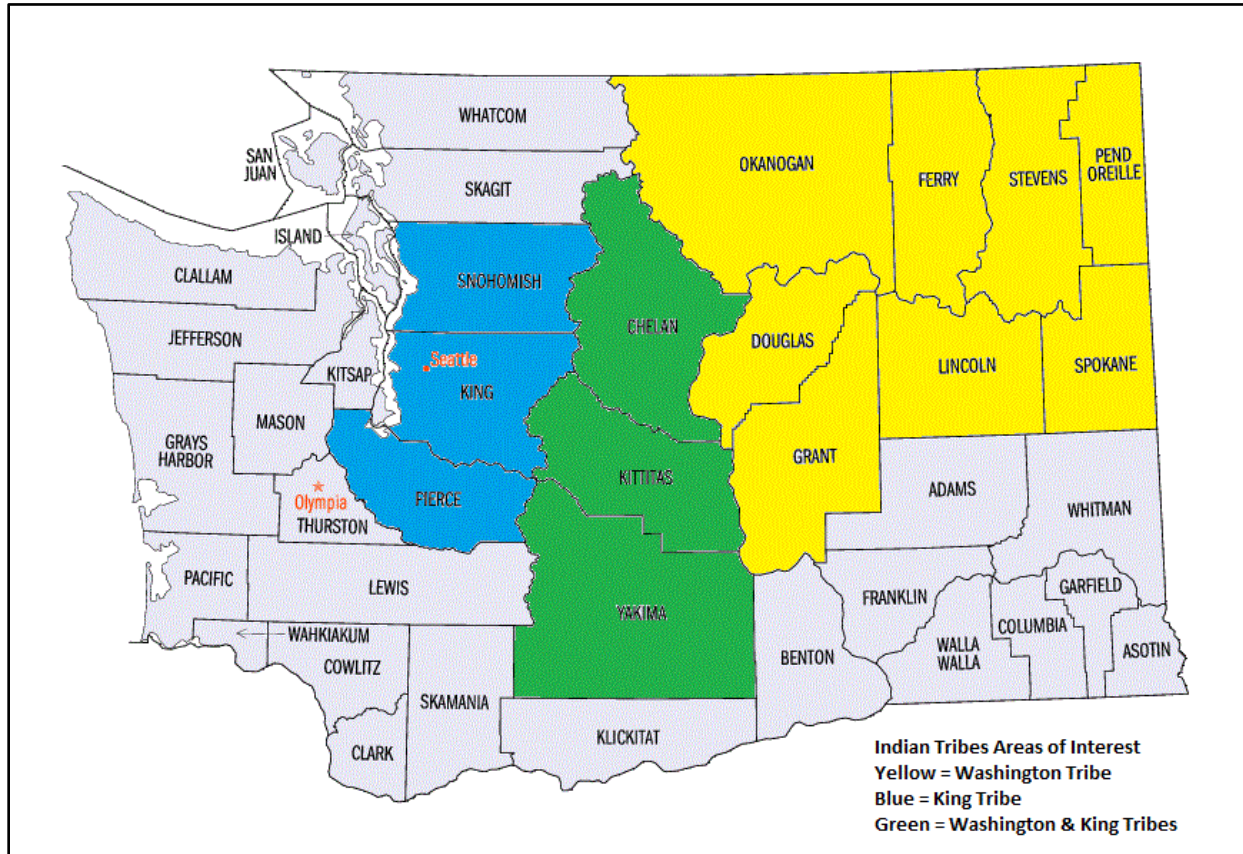
**Tribal leaders** (commonly referred to as a council chair, Tribal chief, business committee leader, etc.) are the heads of an Indian Tribe's Government structure and are generally the lead officials for Government-to-Government consultation. As these leaders may change with elections, make sure you have the current leader identified before contacting the Indian Tribe. Checking the Indian Tribe's web site can be useful for finding current personnel listing.

**Tribal historic preservation office (THPO)** is a branch of the Tribal Government that has assumed SHPO duties on Indian land. These offices will generally host a Tribal contact who will have an ongoing relationship with NRCS in regard to the section 106 process. Your contact in these offices may be the THPO, the section 106 coordinator, or the program director or department head.

The following are resources that can assist in the identification of Tribal contacts regarding section 106:

- Tribal Government web sites should be your first source of information. These are often the most up-to-date and reliable sources of contact information and personnel for the Indian Tribes. If the web site does not provide specific information related to section 106, there are contact menus that provide addresses and phone numbers for Tribal leaders and program staff.
- NPS THPO Program is the Federal agency that is responsible for maintaining and updating an official list of THPO contacts.  
[http://grantsdev.cr.nps.gov/THPO\\_Review/index.cfm](http://grantsdev.cr.nps.gov/THPO_Review/index.cfm)
- NATHPO is a nonprofit organization that maintains a database of THPOs.  
<http://nathpo.org/wp/thpos/find-a-thpo/>
- BIA publishes a list of current Tribal leaders on a biannual basis. The BIA is the responsible Federal agency for maintaining an accurate database of these leaders.  
<http://www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/index.htm>
- BIA Indian reservation map and BIA regions directory  
<http://www.bia.gov/cs/groups/public/documents/text/idc013422.pdf>
- NPS Tribal consultation database for NAGPRA claims shows NAGPRA contacts and contact information.  
<http://grantsdev.cr.nps.gov/Nagpra/NACD/>
- Additional resources that can assist you in defining who you should contact include your State historic preservation office, State and local historical society, regional and local NPS office, Tribal and inter-Tribal web site, and NRCS Tribal liaisons.

### 315.23 Exhibit 4 – Tribal Area of Interest Map Example



Map of Tribal interests (Tribal names are for demonstration purposes only)

Be aware that while NRCS may combine the data they receive from all Indian Tribes into one cohesive map. Do not share an Indian Tribe’s ancestral land information without their expressed written consent.

### 315.24 Exhibit 5 – Federal Regulations for Consultation With Indian Tribes

#### Consultation With American Indian Tribes

Consultation with American Indian Tribal Governments and THPOs is to be carried out in accordance with section 106 of the NHPA and implementing regulations, related authorities on consultation, and policy principles found in Title 410, General Manual, Part 405, “American Indians and Native Alaskans,” and guidance outlined in the Title 190, National Cultural Resources Procedures Handbook, Part 601. The authorities include—

- USDA Departmental Regulation 1340-6, “Policies on American Indians and Alaska Natives” (October 16, 1992).
- Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (November 6, 2000).
- Executive Order 13270, Tribal Colleges and Universities (July 3, 2002).
- Public Law 89-665 (October 15, 1966), 16 U.S.C. Section 470, et seq. (NHPA and its 22 amendments, and implementing regulations for section 106 of the act, 36 CFR Pt. 800), especially regarding special the consultation role of American Indian Tribes, THPOs, and Native Hawaiian organizations.



- Executive Order 13007, Indian Sacred Sites (May 24, 1996).
- Presidential Memorandum to Heads of Executive Departments and Agencies on Tribal Consultation (November 5, 2009), Presidential Memorandum on Tribal Consultation, The White House.
- Prototype programmatic agreements.

### **315.25 Exhibit 6 – Frequently Asked Questions**

The following frequently asked questions provide additional information to the reader.

#### **What are “ancestral lands”?**

Ancestral lands are the areas, whether discrete or continuous, where NHOs, Indian Tribes, or their members have affiliation. These are areas that have cultural, historical, spiritual, subsistence, and/or ceremonial significance ascribed to them. An Indian Tribe’s or NHO’s physical connections to these areas may or may not persist into the modern era; an ongoing physical connection to an area is not required for a site to maintain religious and cultural significance. Ancestral lands are defined by Indian Tribes or NHOs based on their knowledge of their history and connections with that area.

#### **Why is the definition of ancestral lands so broad?**

It is meant to be an inclusive definition rather than exclusive. The definition of ancestral lands utilized by the NRCS is purposely broad so that it encompasses the concepts of ceded, aboriginal, and ancestral land as written in the NHPA’s implementing regulations at 36 CFR Section 800.2(c)(2)(ii)(D).

Through an examination of each of these terms it can be reasonably understood that lands relinquished to the Federal Government (ceded) and lands utilized by an Indian Tribe and their ancestors (ancestral and aboriginal) are to be considered during the course of your section 106 review.

#### **What is “ancestral lands consultation”?**

The good faith effort undertaken by NRCS to consult with Indian Tribes in conjunction with undertakings that occur off of Tribal land. NRCS’s “Tribal Ancestral Lands Consultation Under the National Historic Preservation Act: Guidance for Natural Resource Conservation Service Employees” national instruction provides additional clarification and guidance on this topic.

#### **How is “ancestral lands consultation” any different from the regular consultation process under section 106?**

It isn’t. The consultation process as defined in 36 CFR Part 800 is meant to include ancestral lands consultation. The NHPA and ACHP’s regulations require NRCS to consult with Indian Tribes when they attach religious and cultural significance to a historic property *regardless of the location of that property*. The circumstances of history may have resulted in an Indian Tribe now being located a great distance from its ancestral homelands and places of importance.

Sites of religious and cultural significance are not limited to Tribal lands; this significance may be attributed to sites off Tribal lands, including Federal, State, and private lands. If a site has religious and cultural significance attributed to it by an Indian Tribe, and NRCS has determined that it may be affected by the undertaking, the Indian Tribe has the option to become a consulting party regardless of the land status. The regulations specifically reference an Indian Tribe’s “special expertise” regarding sites of religious and cultural significance and that an agency “shall” acknowledge said expertise.

#### **How do you *identify* historic properties that may possess traditional religious and cultural significance to Indian Tribes?**

NRCS staff can conduct research and may be assisted by Tribal members or contractors knowledgeable of these site types. However, historic properties that are of traditional religious and cultural significance to

an Indian Tribe must be confirmed by an Indian Tribe's designated representative. NRCS's "Tribal Ancestral Lands Consultation Under the National Historic Preservation Act: Guidance for Natural Resource Conservation Service Employees" national instruction provides further insights into how you can locate relevant Indian Tribes, and how to contact the appropriate Tribal representative.

**What are Royce maps and can they help? Don't they already show where ancestral, aboriginal, and ceded lands are?**

The Royce maps are a collection of materials located in the "Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution, 1896–1897." These maps illustrate the "location of each cession by or reservation for the Indian Tribes from the organization of the Federal Government." That is, these are maps that show lands ceded from Indian Tribes to the U.S Government and any lands retained (reservation land) by said Indian Tribe.

This data is very useful at showing land cessions resulting from treaty negotiations, and the NPS and FS have digitized these maps for easy access. However, this information does not include references or illustrations regarding ancestral or aboriginal lands as discussed in the NHPA's implementing regulations. These maps are one source of reference but are not intended to define an Indian Tribe's ancestral lands.

**How do I determine if historic properties of traditional religious and cultural significance to Indian Tribes *may be affected* by the proposed undertaking?**

If the undertaking is the kind of action that might affect places such as archaeological sites, burial areas, stone or earthen features, or ceremonial areas, then you should consult with Indian Tribes that might attach significance to such places. Unless such properties have already been identified through archaeological and ethnographic surveys conducted in the past and the information is readily available, you probably will not know in advance. It is through consultation with Indian Tribes themselves that such properties can be properly identified and evaluated.

**Are "traditional cultural properties" (TCPs) the same as "historic properties that are of traditional religious and cultural significance"?**

No, "traditional cultural property" and historic properties of religious and cultural significance are not interchangeable terms. A traditional cultural property is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that: (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community. TCPs are defined only in NPS guidance and are not referenced in any statute or regulation, and refer to places of importance to any community, not just to Indian Tribes. Therefore, this terminology may be used when an agency is considering whether any property is eligible for the National Register. Within the section 106 process, the appropriate terminology for sites of importance to Indian Tribes is "historic property of religious and cultural significance to an Indian Tribe." Unlike the term TCP, this phrase appears in NHPA and the section 106 regulations and applies strictly to Tribal and NHO sites. Furthermore, NHPA Section 101(d)(6)(A), reminds agencies that historic properties of religious and cultural significance to Indian Tribes may be eligible for the National Register. Thus, it is not necessary to use the term TCP when considering whether a site with significance to an Indian Tribe is eligible for the National Register as part of the section 106 process. The NPS Bulletin 38 guidelines are helpful, however, in providing an overview of how National Register criteria are applied (ACHP 2012).

It is important to note that under the NHPA and the section 106 regulations, the determination of a historic property's religious and cultural significance to Indian Tribes is not tied to continual or physical use of the property (ACHP 2012).

**What do I do if I notify an Indian Tribe of a project and they do not respond?**

Follow the procedures recommended in this guidance regarding "How to Make Contact" and ensure that your initial letter notification is followed up with a phone call and email if appropriate. Document your



contact efforts. If responses are not received after several attempts, contact the Indian Tribe to ensure that you have up-to-date contact information. Personnel shifts, changes in email addresses and phone numbers, and unforeseen circumstances can and do impact communication. If preproject contact cannot be achieved, maintain a copy of all relevant project records and offer to review the project with the Indian Tribe during a subsequent project review or meeting.

**Can I formalize a communication process with an Indian Tribe?**

Yes. Consultation protocols are effective methods of ensuring that consultation with an Indian Tribe is pursued in a regular and collaborative manner. Regardless of whether or not a protocol has been established, NRCS staff should make every effort to *identify the processes* that the Indian Tribe has in place to be involved in the project consultation. If an Indian Tribe shows interest in formalizing a process, refer to the “Consultation Protocol” section of this NI.

**What do I do if the Indian Tribes tell me they want to look at every project?**

Indian Tribes have the choice of requesting what information they need to make informed decisions and this should be honored. Discuss with the Tribal representative the desire for reducing paperwork and streamlining the section 106 process for both parties. NRCS cultural resources personnel should be prepared to present a list of project practices that are considered to have little to no effect on historic properties and those that are considered to have a higher probability to adversely affect historic properties.

Indian Tribes may have a different perspective of what constitutes an adverse effect. Their knowledge of the resource, what makes it significant, and how an undertaking may adversely affect integrity is a reason NRCS conducts consultation. Once a relationship has been built with the Indian Tribe, often, these processes can be streamlined through the development of a consultation protocol or other agreement document.

**How do I verify an Indian Tribe’s determination of significance before making a National Register eligibility determination?**

The ACHP’s guidance states that an agency is not required to verify an Indian Tribe’s determination that a historic property is of religious and cultural significance to the Indian Tribe. The ACHP regulations at 36 CFR Section 800.4(c)(1) state, in part, that—

“[t]he agency official shall acknowledge that Indian Tribes...possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.”

The National Register considers the information obtained from an Indian Tribe’s recognized expert to be a valid line of evidence in considering determinations of significance. For additional guidance on making eligibility determinations, the agency should consult with the staff of the National Register (ACHP 2012).

**I don’t have Indian Tribes in my State, so why should I consult?**

The NRCS consults with Indian Tribes to maintain compliance with Federal law and NRCS policy. As discussed in this guidance, the NHPA and its implementing regulations direct an agency implementing an undertaking with the potential to affect historic properties to consult with Indian Tribes that attach religious and cultural significance to a historic property regardless of its location.

Many Indian Tribes were removed from their homelands, while others traditionally moved from place to place. Consequently, an Indian Tribe may attach significance to historic properties located in an area where they may not have physically resided for many years. An ongoing physical connection to the historic property is not required for an Indian Tribe to ascribe religious and cultural significance to a historic property.

**I have not received any complaints regarding consultation, why should I start doing this now?**

While you may not have received any complaints, the ACHP's regulations require that Federal agencies make "a reasonable and good faith" effort to identify every Indian Tribe and invite them to be consulting parties. To be in legal compliance you must attempt to engage relevant Indian Tribes in consultation. Some Indian Tribes may elect to not participate, but it is the agency's responsibility to initiate consultation.

**How can I show that I conducted a reasonable and good faith effort to identify Indian Tribes and engage them in consultation?**

Documentation of consultation allows consulting parties to accurately track the stages of the section 106 process. Federal agencies should document all efforts to initiate consultation with an Indian Tribe or Tribes, as well as documenting the consultation process once it has begun. Such documentation, in the form of correspondence, telephone logs, emails, etc., should be included in the agency's official section 106 record (ACHP 2012).

Agencies should also keep notes so that the consultation record documents the content of consultation meetings, site visits, and phone calls in addition to information about dates and who participated. Share these records, as they are produced, with Tribal partners so all parties will be aware of what has been said and where you are in the section 106 process. This allows agencies and consulting parties to review proceedings and correct any errors or omissions.

**Why aren't Alaska Natives and Native Hawaiian Organizations discussed in this document?**

Although not called out specifically, Alaska Natives are included. The term "Indian Tribe" as written in 36 CFR Section 800.16(m), means "an Indian Tribe, band, nation, or other organized group or community, including a native village, regional corporation, or village corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. Sec. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

**What if the Indian Tribes want to review ancestral lands projects off Tribal lands that are exempt from review under our PPA with the SHPO?**

If the Indian Tribes were not signatories to the PPA, the exemption list does not apply to them. While the agency official has some latitude in determining if an activity does not have the potential to cause effects on historic properties, assuming such historic properties are present (under 36 CFR Sec. 800.3(1)), the agency should recognize the special expertise the Indian Tribes have when it comes to historic properties of religious and cultural importance and that these sites may be affected by NRCS activities in a manner not previously considered by NRCS. Project-by-project consultation may better identify these concerns or the development of consultation protocols.

**Can the Indian Tribes tell me what projects they want to look at and what they don't want to review on ancestral lands?**

Off Tribal lands, while NRCS needs to consider the effects of their undertakings on historic properties, a Tribe may inform NRCS regarding projects or locations they'd like to be consulted on and those they do not. NRCS should document those decisions and may follow that guidance. These reviews or review areas should be reevaluated annually during meetings with your Tribal partners. Consider formalizing these Tribal decisions in a consultation protocol or an agreement document (PPA, PA, etc.) on Tribal lands, NRCS needs to consider the effects of their undertakings on historic properties in the same manner they do when working off Tribal lands. Unless these activities are exempted from review under a Tribal PPA, NRCS needs to conduct standard section 106 actions, including consultation.

**The Indian Tribe has not identified any sites of religious and cultural significance near my project area, but still requests NRCS conduct a cultural resource survey. What do I do?**

NRCS is responsible for making a reasonable and good faith effort to identify historic properties and consulting with others who may have knowledge of historic properties in the area. This effort should include, at a minimum, a review of existing information on historic properties that are located or may be located within the area of potential effects (APE). If the Indian Tribe does not provide information on sites of religious and cultural significance near the project area or why they think there may be sites there, NRCS decides what level of review is appropriate based upon existing information and the level of Government involvement. Indian Tribes may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites (36 CFR Sec. 800.4(a)(4)). The responsible agency official should address concerns raised about confidentiality pursuant to the NHPA's implementing regulations.

**References**

ACHP 2012. Consultation with Indian Tribes in the Section 106 Review Process: A Handbook.  
<http://www.achp.gov/pdfs/consultation-with-indian-tribes-handbook-june-2012.pdf>

## **315.26 Exhibit 7 – Tribal Ancestral Lands Consultation Workgroup Members**

### **Natural Resources Conservation Service**

- **Ms. Melissa Gutierrez**, Cultural Resources Coordinator, NRCS, East Lansing, MI.
- **Mr. John Riggs**, former Cultural Resource Specialist and Tribal Liaison, NRCS, Lonoke, AR.
- **Ms. Sharron Santure**, former Cultural Resources Specialist and Tribal Liaison, NRCS, Edwards, IL.
- **Mr. Dana Vaillancourt**, Federal Preservation Officer, NRCS, Washington, DC.

### **National Association of Tribal Historic Preservation Officers**

- **Ms. D. Bambi Kraus**, President, National Association of Tribal Historic Preservation Officers.
- **Mr. Robert Cast**, Tribal Archaeologist, Choctaw Nation of Oklahoma.

### **Forest County Potawatomi Community**

**Ms. Melissa Cook**, former Tribal Historic Preservation Officer, Forest County Potawatomi Community.

### **Choctaw Nation of Oklahoma**

- **Ms. Lindsey Bilyeu**, Senior Review and Compliance Officer, Choctaw Nation of Oklahoma Cultural Services.

### **Advisory Council on Historic Preservation**

- **Mr. Ira L. Matt**, Senior Program Analyst, Advisory Council on Historic Preservation. Former ACHP Liaison to NRCS.

## **315.87 Exhibit 8 – State Examples**

### **State Example 1**

#### **Michigan-NRCS's Consultation Method and Agreement Development Process**

In July 2015, NRCS MI met with the Michigan Anishinaabek Cultural Preservation and Repatriation Alliance (MACPRA), a group that includes the 12 federally recognized Indian Tribes and two State historic Indian tribes that reside in Michigan, to start development of a prototype programmatic agreement to address consultation on NRCS undertakings. NRCS staff prepared for the meeting by creating a document to share with the Tribal representatives that included several items. The goal was to properly introduce our agency and the type of work that we do to the participants and through discussion, determine the type of work, specifically conservation practices, that Indian Tribes would have an interest in for consultation.

There was a previous memorandum of understanding (MOU) between NRCS MI and MACPRA stating that we would consult on NRCS projects but it did not provide specifics of day-to-day consultation. This previous MOU had been terminated but the group expressed an interest in developing a new group agreement as opposed to separate agreements with individual Indian Tribes. NRCS gave a presentation regarding the history of the past agreement and of the following information provided in a handout:

- History and background of NRCS
- NRCS mission and vision
- NRCS MI organizational structure with photographs of our leadership and Tribal liaisons assigned to each Indian Tribe
- Brief overview of the conservation planning and delivery processes
- Listing of conservation practices (with numbers and funds obligated for each) that have been contracted with Michigan's federally recognized Indian Tribes and Tribal colleges over the past 10-plus years
- Before and after photographs of selected practices
- Information on past NRCS assistance to Indian Tribes from the Rose Lake Plant Materials Center and presentation of sweetgrass braids prepared by NRCS staff in appreciation to the Tribal representatives for working with us
- Information on the agreement that we were working to create, with related reference materials

The above provided background understanding for the following discussion. Using an NRCS facilitator, we reviewed each conservation practice used in Michigan. This was done using a 20-page listing of practices within the handout that included a brief description and count planned or installed over the last 3 years (to show disturbance and frequency) for each. The listing was organized in groups based on NRCS assignment of degree of potential to affect cultural or historic properties (high, low, or no). As we read each practice and described what was involved, State specialists clarified the disturbance created by each as the discussed methods of installation, the resource concern that the practice commonly addresses, and answered any questions. Tribal representatives expressed any concerns and either agreed or disagreed with the

present listing providing Tribal perspective of potential effects. This process, although long, did raise the awareness of NRCS about concerns not previously considered, such as access restriction that could prevent access to sacred sites unknown to NRCS and application of herbicides possibly affecting culturally significant plants and health of Tribal members.

A questionnaire was distributed for each individual Indian Tribe to provide specific feedback on their area of interest, Tribal lands, consultation format, and comments.

NRCS staff present included the cultural resources coordinator, outreach coordinator, area biologist, design engineer, State forester, multiple district conservationists some of whom were also Tribal liaisons, and an area conservationist.

## **State Example 2**

### **South Dakota NRCS's Annual Ancestral Lands Consultation Method by Program**

The following is an example of annual Tribal ancestral lands consultation by program and was developed by cultural resource staff in South Dakota in 2012 for resident Indian Tribes, and expanded to nonresident Indian Tribes in 2015. The intent of this type of consultation includes—

- Providing Tribal partners a visual representation of where the upcoming year's EQIP contracts were located without excessive paperwork.
- Allowing partners an opportunity to select projects in locations of cultural or spiritual interest and request additional information on those specific areas of concerns.
- Avoiding project-by-project consultation off reservations.
- Addressing an entire year's program in one mailing prior to the field construction season.
- Developing a process that would involve primarily State office staff to limit any additional workload on field or area offices.
- Complying with the National Historic Preservation Act (NHPA).

### **Identifying Indian Tribes With Interests in South Dakota**

There are nine federally recognized Tribal reservations in South Dakota making up approximately 12 percent of the State. To identify other interested Indian Tribes, existing online resources were utilized to identify those who have previously identified parts of South Dakota to be of ancestral or cultural interest. These resources included the National Park Service's (NPS's) Native American Consultation Database (NACD) (<https://grantsdev.cr.nps.gov/Nagpra/NACD/>). Another resource utilized was the U.S. Department of Housing and Urban Development's (HUD's) Tribal Directory Assessment Tool (TDAT) (<https://egis.hud.gov/tdat/>). These searches were conducted at the county level to identify the specific counties of interest to individual Indian Tribes.

Based upon county-level data, a consultation list was developed for all Indian Tribes with identified ancestral lands interests in South Dakota. Utilizing further online resources (e.g., Tribal web sites, National Association of Tribal Historic Preservation Officers, etc.), a current mailing list with email addresses was developed.

### **Environmental Quality Incentives Program (EQIP) Data**

Determining when in the EQIP application, ranking, and obligation stage to acquire needed locational data was an important consideration. The application phase would include a large number of projects that would not be funded and the obligation phase was a little too far along in the process. It was decided to acquire locational data on projects that were ranked high enough that they would almost certainly be funded. Ironically, this locational data in ProTracts was not available at the State level, and the assistant State conservationist for programs would make a request to national headquarters for a monthly (or at the end of a quarter) report of South Dakota's EQIP information from the REAP Data Team including locational data (latitude and longitude). This data would be requested soon after the South Dakota field staff's January data entry or at the end of a quarter (March 31). This final report was delivered by the national REAP data team as an Excel spreadsheet.

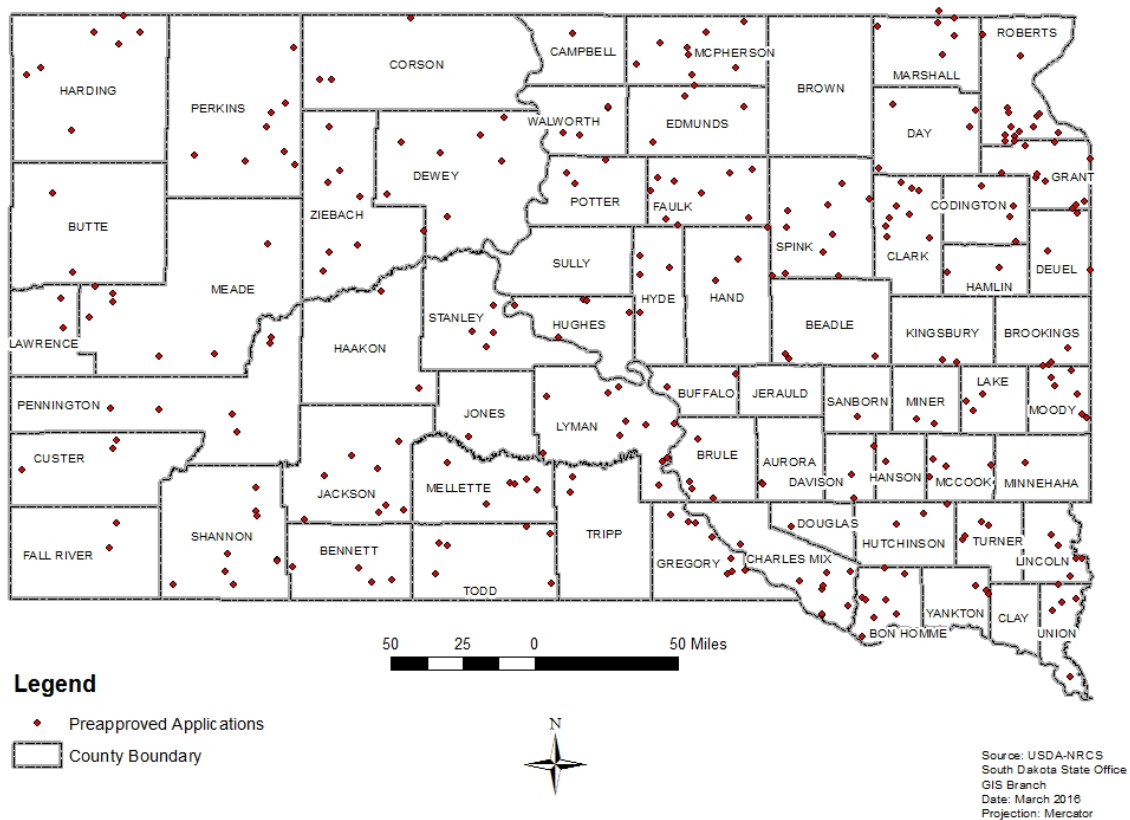
#### Creating the State Project Map

The next stage in the process was to take the Excel spreadsheet locational data and convert it into map location points. The spreadsheet data (latitude and longitude) was given to the State geographic information system (GIS) staff and a draft map produced. The map printed on 8½ by 11-inch paper for ease of mailing and to provide a general graphic representation of contract locations.

Once the map was created, quality control of the general project locations was made to make sure projects appeared in the correct general locations (i.e., correct counties).

Below is a sample of the ancestral lands EQIP contract location consultation map for South Dakota for fiscal year 2016. This map was included in the resident Indian Tribes mailer.



**2016 SOUTH DAKOTA NRCS EQIP APPLICATIONS****Consultation Letters (Resident and Nonresident Indian Tribes) (Samples Attached)**

These consultation letters were addressed to the Tribal chairperson and copied to the Tribal historic preservation officers (THPOs) or appropriate representative. The maps with the nonresident Indian Tribes mailing identified the counties (on each attached map) that the Indian Tribe had identified on online resources, but noted that the Indian Tribe could identify additional areas they were concerned about. A sample copy of an in-State and out-of-State consultation letter is attached.

**Courtesy Notification to Other State Conservations in Nonresident Tribal Areas**

As the State conservationist would be consulting with Tribal partners in adjacent States, an email was sent to the other State conservationists letting them know and included a map and sample letter. The text of this notification was as follows:

“As an FYI, South Dakota (SD) NRCS conducts “ancestral lands” (lands outside of reservation boundaries) Tribal consultation pursuant to the Section 106 of the National Historic Preservation Act of 1966 (as amended) and other USDA and NRCS written policies and directives that provide guidance for meaningful consultation with Indian Tribes. While SD has been conducting ancestral lands

consultation the past several years to in-State resident Indian Tribes, this year, SD is also conducting ancestral lands consultation to non-resident Indian Tribes. These non-resident Indian Tribes ancestral lands areas were identified through existing databases and includes Indian Tribes in Oklahoma, Minnesota, North Dakota, Nebraska and Montana. As a courtesy, I wanted you to be aware that I will be sending consultation letters to Indian Tribes within your States asking them to identify counties and/or project locations of concern to them within SD. SD would then consult directly on those areas and address their concerns. As you may have Tribal Liaisons or other staff in these areas, I wanted you to be aware of this mailing so you could let your staff be aware of this mailing in case they get local questions. The Indian Tribes we are contacting are as follows: Ponca Tribe of Indians of Oklahoma, Omaha Tribe of Nebraska, Santee Sioux Nation (NE), Ponca Tribe of Nebraska, Three Affiliated Tribes/Mandan, Hidatsa & Arikara Nation (ND), Spirit Lake Tribe of Fort Totten (ND), Assiniboine and Sioux Tribes of Fort Peck Indian Reservation (MT), Upper Sioux Community (MN), Prairie Island Indian Community (MN) and the Lower Sioux Indian Community (MN).”

**CERTIFIED MAIL – RETURN RECEIPT REQUESTED**

(Stamp date when signed)

[Name of Tribal Leader]

[Title of Contact]

[Name of Tribal Organization]

[Address]

[City, State, ZIP]

RE: Fiscal Year [20##] NRCS Resident Indian Tribes' Ancestral Lands Consultation

Dear [Name]:

The Natural Resources Conservation Service (NRCS) is a Federal agency that works with private and Tribal producers and landowners to help them conserve, maintain, and improve their natural resources. The NRCS emphasizes voluntary, science-based conservation; technical assistance; partnerships; incentive-based programs; and cooperative problem solving at the community level. The producer or landowner may seek assistance from NRCS to provide technical assistance (TA) in the form of an engineering design or financial assistance (FA) in the form of cost-share through an NRCS program. The producer or landowner is the project proponent and is responsible for obtaining all required easements or permits associated with the project. Over the next year, the NRCS will continue to assist producers and landowners throughout [State] with conservation activities through TA and FA as part of its Environmental Quality Incentives Program. Conservation activities may include such things as pipelines and watering tanks for livestock, animal waste storage facilities, planting shelterbelts or riparian buffers, construction of ponds, grassed waterways, and other conservation practices.

As a Federal agency, NRCS complies with the National Historic Preservation Act of 1966 (as amended), and implementing regulations, and takes historic properties (i.e., buildings, structures, archeological sites, objects, traditional cultural properties and districts eligible or listed in the National Register of Historic Places) into account for all undertakings that have the potential to affect such properties. Section 800.4(b)(1) of these regulations states that Federal agency officials must make a “reasonable and good faith effort” to identify historic properties within each project’s area of potential effects (APE) that may be affected by their undertakings. This reasonable and good faith effort may consist of or include background research, consultation, interviews, sample field investigations, and field survey. In general, the APE for each NRCS practice type remains consistent.

A sample of NRCS undertakings with the potential to affect historic properties are as follows, for livestock water pipelines an excavation width of 1-2 feet and depth of 6 feet is typically conducted with a rubber tire backhoe or trencher. NRCS staff examines this area at a 50- to 100-foot-wide APE to accommodate minor alignment changes and to locate any adjacent features. Stock water tank areas are generally leveled with a small blade and some fill utilized (50- to 100-foot-square area). A well can consist of an area approximately 100-foot square and can include a livestock water tank, windmill, or pumping plant. Shelterbelts can vary in horizontal size and initial disturbances can be to a depth of approximately 12–18 inches. Obviously, the long-term effect of trees depends upon the root system. Ponds consist of constructing a dam within an existing drainage and fill can be utilized from the area to be impounded or from adjacent hills.

The pond APE also includes the area where the water will be impounded (pool area). A fabricated windbreak is a solid fence, constructed with larger posts, and two wing walls up approximately 100 feet in length to provide shelter from wind for livestock (can have a visual effect to the area). Well decommissioning includes minor excavation around an existing well that will be capped. Grazing lands mechanical treatment consists of breaking the clay pan to usually 6 inches or so and planting native species. Access to project locations is typically along established roads or trails, then across the subject fields or pastures.

[State] NRCS has professional cultural resource specialists on staff and each project with the potential to affect historic properties is checked for known archeological sites, national or State register listed properties, and is field reviewed. [State] NRCS acknowledges that Tribal partners may be aware of cultural resources that have not been previously identified on State or national lists. As some of these proposed projects may be located on land your Tribe considers ancestral, NRCS is providing your Tribe a reasonable opportunity to identify your concerns about historic properties, including those of traditional religious and cultural importance. At this juncture, NRCS is **not** asking for specific information and documentation regarding the location, nature, and condition of individual sites; we are merely consulting per the regulations if you have concerns related to sites of religious and cultural significance to historic properties in the vicinity of these locations. This information would be appreciated and considered in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public or other entities in the effects on historic properties, the confidentiality concerns of individuals and Tribes, and the relationship of the Federal involvement to the undertaking.

Please review the attached map identifying the general location of *proposed* projects that may be located on ancestral, aboriginal, or ceded lands. NRCS asks for a response within 45 days of receipt of this letter if your Tribe has existing information identifying historic properties of religious and cultural significance to your Tribe, or concerns with any of these general locations. When concerns have been identified, NRCS will consult further on those projects if they become funded contracts and include undertakings with the potential to affect historic properties. You may simply circle projects on the map you would like more information on and return a copy of the map to me. Projects within reservation boundaries or on dependent Indian communities are being submitted with more detailed information to individual THPO or cultural resource representatives under a different mailing. NRCS will continue to conduct project-by-project consultation with the THPO or cultural resource representatives on all projects with the potential to affect historic properties within the appropriate jurisdictions.

Please contact [CRS/CRC], [Title], at [phone #], if you have any further questions or concerns on this ancestral lands consultation mailing. Thank you for your cooperation in protecting important cultural resources.

Sincerely,

[Name]

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State Conservationist

Attachment (Map)

cc: THPO

**CERTIFIED MAIL – RETURN RECEIPT REQUESTED**

(Stamp date when signed)

[Name of Tribal Leader]  
[Title of Contact]  
[Name of Tribal Organization]  
[Address]  
[City, State, ZIP]

RE: Fiscal Year [20##] [State] NRCS Out-of-State Ancestral Lands Consultation Letter

Dear [Name]:

The Natural Resources Conservation Service (NRCS) is a Federal agency that works with private and Tribal producers and landowners to help them conserve, maintain, and improve their natural resources. NRCS emphasizes voluntary, science-based conservation; technical assistance; partnerships; incentive-based programs; and cooperative problem solving at the community level. The producer or landowner may seek assistance from NRCS to provide technical assistance (TA) in the form of an engineering design or financial assistance (FA) in the form of cost-share through an NRCS program. The producer or landowner is the project proponent and is responsible for obtaining all required easements or permits associated with the project. Over the next year, the NRCS will continue to assist producers and landowners throughout [State] with conservation activities through TA and FA as part of its Environmental Quality Incentives Program. Conservation activities may include such things as pipelines and watering tanks for livestock, animal waste storage facilities, planting shelterbelts or riparian buffers, construction of ponds, grassed waterways, and other conservation practices.

As a Federal agency, NRCS complies with the National Historic Preservation Act of 1966 (as amended), and implementing regulations, and takes historic properties (i.e., buildings, structures, archeological sites, objects, traditional cultural properties and districts eligible or listed in the National Register of Historic Places) into account for all undertakings that have the potential to affect such properties. Section 800.4(b)(1) of these regulations states that Federal agency officials must make a “reasonable and good faith effort” to identify historic properties within each project’s area of potential effects (APE) that may be affected by their undertakings. This reasonable and good faith effort may consist of or include background research, consultation, interviews, sample field investigations, and field survey. In general, the APE for each NRCS practice type remains consistent.

A sample of NRCS undertakings with the potential to affect historic properties are as follows, for livestock water pipelines an excavation width of 1-2 feet and depth of 6 feet is typically conducted with a rubber tire backhoe or trencher. NRCS staff examines this area at a 50- to 100-foot-wide APE to accommodate minor alignment changes and to locate any adjacent features. Stock water tank areas are generally leveled with a small blade and some fill utilized (50- to 100-foot-square area). A well can consist of an area approximately 100-foot square and can include a livestock water tank, windmill, or pumping plant. Shelterbelts can vary in horizontal size and

initial disturbances can be to a depth of approximately 12-18 inches. Obviously, the long-term effect of trees depends upon the root system. Ponds consist of constructing a dam within an existing drainage and fill can be utilized from the area to be impounded or from adjacent hills. The pond APE also includes the area where the water will be impounded (pool area). A fabricated windbreak is a solid fence, constructed with larger posts, and two wing walls up approximately 100 feet in length to provide shelter from wind for livestock (can have a visual effect to the area). Well decommissioning includes minor excavation around an existing well that will be capped. Grazing lands mechanical treatment consists of breaking the clay pan to usually 6 inches or so and planting native species. Access to project locations is typically along established roads or trails, then across the subject fields or pastures.

[State] NRCS has professional cultural resource specialists on staff and each project with the potential to affect historic properties is checked for known archeological sites, national or State register listed properties, and is field reviewed. [State] NRCS acknowledges that Tribal partners may be aware of cultural resources that have not been previously identified on State or national lists. As some of these proposed projects may be located on land your Tribe considers ancestral, NRCS is providing your Tribe a reasonable opportunity to identify your concerns about historic properties, including those of traditional religious and cultural importance. At this juncture, NRCS is not asking for specific information and documentation regarding the location, nature, and condition of individual sites, we are merely consulting per the regulations if you have concerns related to sites of religious and cultural significance to historic properties in the vicinity of these locations. This information would be appreciated and considered in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public or other entities in the effects on historic properties, the confidentiality concerns of individuals and Tribes, and the relationship of the Federal involvement to the undertaking. In examining the National Park Service's Native American Graves Protection Act consultation database and other sources, it was identified that your Tribe may have ancestral lands concerns in counties in [State]. I've attached a map identifying these counties. Please let us know if this map is accurate [sample attached].

Please review the attached map identifying the general location of *proposed* projects that may be located on ancestral, aboriginal, or ceded lands. NRCS would appreciate a response within 45 days of receipt of this letter if your Tribe has information identifying historic properties of religious and cultural significance to your Tribe, or concerns with any of these identified locations within the identified counties, or another South Dakota county you'd like to identify. When concerns have been identified, NRCS will consult further on those projects if they become funded contracts and include undertakings with the potential to affect historic properties. You may simply circle projects on the map you'd like more information on and return a copy of the map to me. Projects within reservation boundaries or on dependent Indian communities are being submitted with more detailed information to those THPOs or cultural resource representatives under a different mailing. NRCS will continue to conduct project-by-project consultation with the THPO or cultural resource representatives on all projects with the potential to affect historic properties within the appropriate jurisdictions.

Please contact [CRS/CRC], [Title], at [Phone #], or [email], if you have any further questions or concerns on this ancestral lands consultation mailing. If you would prefer this information in



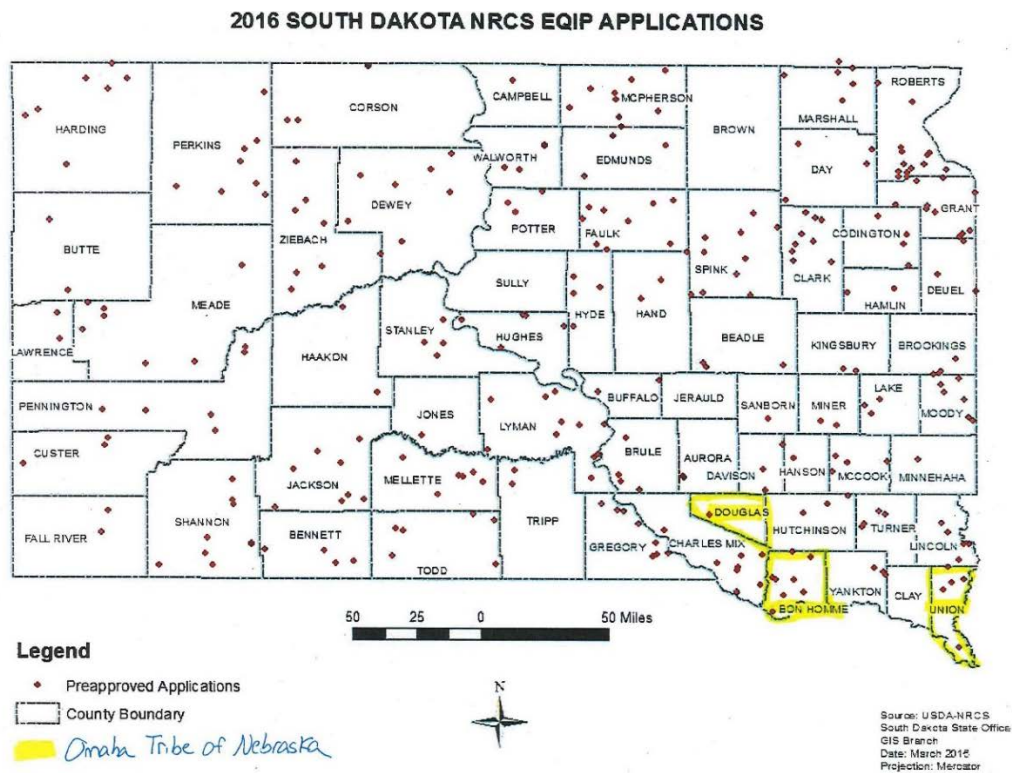
another format in the future, please let [CRS/CRC] know. Thank you for your cooperation in protecting important cultural resources.

Sincerely,

[Name]  
State Conservationist

Attachment

cc: THPO



Sample nonresident Tribal consultation map identifying specific counties of interest.

## State Example 3

### Sample Ancestral Lands Consultation Introduction Letter

(Stamp date when signed)

[Name of Tribal Leader]

[Title of Contact]

[Name of Tribal Organization]

[Address]

[City, State, ZIP]

RE: Initiation of Tribal Consultation Under Section 106 of the National Historic Preservation Act for Identification of Ancestral Lands in [STATE]

Dear [NAME OF TRIBAL OFFICIAL (with appropriate honorific)]

Chairperson – Honorable

I hope this letter finds you well. My staff and I are looking forward to opening a dialog with your Tribe consisting of Government-to-Government consultation regarding the identification of ancestral lands. We also look forward to working with you on specific projects in the future. The U.S. Department of Agriculture (USDA) Natural Resource Conservation Service (NRCS) is a Federal agency that works with producers and landowners to help them conserve, maintain, and improve the condition of natural resources on their land. The NRCS emphasizes voluntary, science-based conservation; technical assistance; partnerships; incentive-based programs; and cooperative problem solving at the community level. The producer or landowner may seek assistance from NRCS to provide technical assistance in the form of an engineering design or financial assistance in the form of cost-share through an NRCS program. The producer or landowner is the project proponent and is responsible for obtaining all required easements or permits associated with the project. Over the next year, NRCS will continue to provide conservation technical and financial assistance in [STATE]. Conservation activities may include such things as pipelines and watering tanks for livestock, animal waste storage facilities, planting shelterbelts or riparian buffers, construction of ponds, grassed waterways, and other conservation practices [*Place most common State practices here*].

As a Federal agency, NRCS complies with the National Historic Preservation Act of 1966 (as amended), and implementing regulations, and takes historic properties (i.e., buildings, structures, archeological sites, objects, traditional cultural properties and districts eligible or listed in the National Register of Historic Places) into account for all undertakings that have the potential to affect such properties. Section 800.4(b)(1) of these regulations states that Federal agency officials must make a “reasonable and good faith effort” to identify historic properties within each project’s area of potential effects (APE) that may be affected by their undertakings. This reasonable and good faith effort may include background research, consultation, interviews, sample field investigations, and field survey.

NRCS is interested in strengthening its Tribal consultation efforts by conducting Government-to-Government consultations with Tribal Nations. NRCS [STATE] invites [TRIBAL ORGANIZATION] to enter into Government-to-Government consultation with NRCS [STATE]. NRCS's goals are to [begin/continue] an ongoing program of Tribal consultation between [TRIBAL ORGANIZATION] and the NRCS [STATE] and to identify ancestral lands and areas of religious and cultural significance for your Tribe in [STATE]. (If there is an agreement concerning Tribal consultation between your State NRCS and the Tribal organization – reference that agreement). Please partner with us to identify general locations where [TRIBAL ORG] has information concerning historic properties and or those of religious and cultural significance. In examining the National Park Service's Native American Graves Protection Act consultation database and other sources, it was identified that [TRIBE] may have ancestral lands concerns in counties in [State]. I've attached a map identifying these counties. Please work with us to create an accurate map. [Sample attached.] NRCS [STATE] is committed to the goal of making a good faith effort to identify and protect historic properties and areas with religious and cultural significance. As this program of Government-to-Government consultation continues, NRCS welcomes any updates or refinements of the map at any time.

I invite you to discuss the identification of ancestral lands in [STATE] and will be reaching out to schedule a call or meeting soon. If [NAME OF TRIBAL ORGANIZATION] is interested in arranging a consultation meeting for your Nation, have any questions, or need additional information, please contact me by telephone (xxx) xxx-xxxx or email xxxx@xxx.gov. I look forward to hearing from you.

Sincerely,

[NAME]  
State Conservationist

Enclosures – map of State with counties  
Include any known information

CC:  
THPO  
NRCS CRS

## State Example 4

### Sample Tribal PPA Introduction Letter

(Stamp date when signed)

[Name of Tribal Leader]

[Title of Contact]

[Name of Tribal Organization]

[Address]

[City, State, ZIP]

RE: Initiation of Tribal Consultation Under Section 106 of the National Historic Preservation Act for Prototype Programmatic Agreement Regarding Conservation Assistance in [STATE]

Dear [NAME OF TRIBAL OFFICIAL (with appropriate honorific)]

Chairperson – Honorable

I hope this letter finds you well. My staff and I are looking forward to opening a dialog with your Nation consisting of government-to-government consultation. The U.S. Department of Agriculture (USDA) Natural Resource Conservation Service (NRCS) of [STATE] is a Federal agency branch that provides funding for a variety of agricultural programs within [STATE].

NRCS is in the process of implementing a nationwide prototype programmatic agreement (PPA) regarding conservation assistance with State historic preservation officers (SHPOs) and Indian Tribes in order to create an efficient section 106 process, which will thoroughly consider impacts to historic properties and areas of cultural and religious significance. The nationwide PPA was developed by NRCS with input from the National Conference of State Historic Preservation Officers, the National Association of Tribal Historic Preservation Officers, and the Advisory Council on Historic Preservation to serve as a framework for more tailored agreements between the NRCS and SHPOs, and between the NRCS and Tribal Governments.

NRCS [STATE] invites [TRIBAL ORGANIZATION] to participate in Government-to-Government Tribal consultation to create a formal State-based agreement under this national PPA and [to begin/continue] an ongoing program of Tribal consultation between [TRIBAL ORGANIZATION] and the NRCS [STATE] under section 800.2(4) of the 36 CFR Part 800 implementing regulations for section 106. *(If there is an agreement concerning Tribal consultation between your State NRCS and the Tribal organization – reference that agreement).* The advantages of a formal agreement between [Tribal Organization] and NRCS [STATE] is the agreement can encompass Tribal land as well as ancestral lands and can create responsible efficiencies in the section 106 process across [STATE] with one agreement document. The agreement will increase the efficiency of section 106 compliance by creating a list of NRCS conservation practices, specifying the exact nature of the practices and their likely effects on historic properties and sites of religious and cultural significance. Working together, NRCS and [TRIBAL ORGANIZATION] can designate particular areas of interest and practices of concern in the agreement. Under the proposed State-based agreement, [TRIBAL ORGANIZATION] can

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receive project notifications on a predetermined schedule about projects in specific areas that are of interest while eliminating unnecessary notifications outside the area of interest or regarding practices that have little potential to adversely affect historic properties and areas of cultural and religious significance.

I invite you to discuss the development of a State-based prototype programmatic agreement and will be reaching out to schedule a call or meeting soon. If [NAME OF TRIBAL ORGANIZATION] is interested in arranging a consultation meeting for your Nation, have any questions, or need additional information, please contact me via telephone (xxx) xxx-xxxx or email xxxx@xxx.gov. I look forward to hearing from you.

Sincerely,

[NAME]  
State Conservationist

Enclosures – PPA template

CC:  
THPO  
NRCS CRS

## **State Example 5**

### **Sample Tribal Consultation Protocol**

#### **TRIBAL CONSULTATION PROTOCOL**

**BETWEEN THE UNITED STATES DEPARTMENT OF AGRICULTURE  
NATURAL RESOURCE CONSERVATION SERVICE  
AND  
[NAME OF TRIBE]  
REGARDING SECTION 106 CONSULTATION**

**WHEREAS**, NRCS has determined that the requirement to fulfill its obligation of Government-to-Government consultation may be more efficient and effective if conducted through the use of a mutually agreed upon consultation protocol, and

**WHEREAS**, The NRCS and [Tribe] referred to as “the Parties” wish to enter into a protocol for a consistent, meaningful and effective process for Consultation and the Parties wish to maintain respectful relations with each other and to deal fairly, openly, and intelligently in the Consultation process so that decisions with respect to their respective responsibilities are made on the best possible knowledge, and

**NOW THEREFORE**, The Parties state the following:

#### **I. Purpose**

The purpose of this Protocol is to set out the Parties’ intentions with respect to the process whereby they will carry out Consultations between them required by section 106 of the National Historic Preservation Act (NHPA) (54 U.S.C. Sec. 306108), and its implementing regulations, 36 CFR Part 800. While this Protocol will set out a process for section 106 consultation between NRCS and the [Tribe] on ancestral [and Tribal] lands, it does not change the NRCS responsibility to comply with 36 CFR Part 800 in [STATE]. As a protocol, it is not intended that it be a binding contract and it does not create, recognize, or deny rights and obligations, including funding obligations, on the part of any Party.

#### **II. Definitions**

“Consultation” means the process of seeking, discussing, and considering the views of other participants, and where feasible, seeking agreement with them regarding matters arising in the section 106 process (36 CFR Sec. 800.16 (f)). “Consult” or “Consultation” is to provide—

- a. to the party to be Consulted, notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;
- b. a reasonable period of time in which the party to be Consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged to Consult; and
- c. full and fair consideration by the party obliged to Consult of any views presented.

“Consulted Party” means the Party to be Consulted.

“Consulting Party” means the Party obliged to Consult.

“Protocol” means this Agreement between [Tribe] and NRCS [STATE].

### **III. Principals**

The Parties intend that Consultations between them will be meaningful and will enhance Government-to-Government relations. Therefore—

- a. The Parties will Consult in a transparent, proactive, flexible, workable and effective manner, recognizing that the nature and scope of Consultation may vary from Undertaking to Undertaking.
- b. The Parties will Consult in a mutually respectful manner, striving to demonstrate—
  1. a shared understanding of the purpose of the Consultation;
  2. clear communications between the Parties;
  3. timeliness in initiating and responding to Consultations;
  4. an appreciation of the need for workable approaches and solutions.

### **IV. Applicability**

This Protocol will apply to all Consultations undertaken by the Parties pursuant to the section 106 of the NHPA (54 U.S.C. Sec. 306108), and its implementing regulations, 36 CFR Part 800, and any other consultations upon which the Parties agree the Protocol will apply.

### **V. Roles and Qualifications**

- a. The NRCS [STATE] State conservationist is responsible for Government-to-Government consultation with [TRIBE] leaders and/or their THPO. These responsibilities may not be delegated to any other staff, nor carried out on behalf of NRCS by another Federal agency.
- b. The cultural resources specialist [and/or] cultural resources coordinator (CRS/CRC) is the NRCS [STATE] staff member officially designated by the State conservationist as the point of contact for section 106 Consultation. The CRS/CRC will be directly responsible for assisting the State conservationist in interacting with [TRIBE] including preparing section 106 consultation information, meeting logistics, and communicating with [TRIBE] staff and or THPO to produce agendas, documents, etc.
- c. The [TRIBE] leader or designated staff [identify here] or THPO will communicate with NRCS CRS/CRC in support of the Protocol.

### **VI. Training**

The Parties acknowledge that each have respective internal processes, trainings and expertise. The Parties will invite each other to their respective trainings in order to better understand organizational structures, requirements, and cultural resource concerns and identification methods.

### **VII. Section 106 Review Consultation Procedures**

The Parties intend the procedures in exhibit B to be followed for all Consultations except where, by prior agreement between them, the procedures may be modified to address specific circumstances. The NRCS agency official, State conservationist, may not delegate Consultation responsibilities. If [Tribe] delegates consultation responsibilities, they will ensure that their departments, agents and contractors carrying out Consultations on their behalf are aware of the understandings in this Protocol.



- a. The Consulting Party will initiate the Consultation process as soon as practical and in any case, sufficiently before substantive decisions are made concerning the matter in question to ensure that the Consultations are meaningful and effective.
- b. The Consulting Party will provide written notice of its intention to Consult the Consulted Party, in the form of a written Notice of Consultation to be provided to the Consulted Party in the following manner:
  1. The Notice of Consultation will be delivered via official government email or delivered by any other means agreed to by the Parties to the Consultation process.
  2. When the NRCS [STATE] is to be Consulted, the Notice of Consultation will be addressed to the State conservationist and copied to the CRS/CRC, referenced in exhibit A to this Protocol.
  3. When the [Tribe] is to be Consulted, the Notice of Consultation will be addressed to the Tribal Chairperson and copied to the THPO or designated CR staff member referenced in Exhibit A to this Protocol.
  4. The Notice of Consultation will be considered to have been made and received—
    - (i) if delivered by official email on the date of the email;
    - (ii) if delivered personally or by courier, on the next business day after the day on which it was received by the addressee or a responsible representative of the addressee;
    - (iii) if transmitted by fax and the sender receives confirmation of the transmission, on the business day next following the day on which it was transmitted;
    - (iv) if mailed by prepaid registered or certified post, the business day next following the day on which the post *office* certifies that the mail was delivered; or
    - (v) if delivered by any other means agreed to by the Parties to the Consultation, on the business day next following the day on which the agreed means of delivery verifies the receipt.
- c. The Notice of Consultation will include the following information:
  1. A statement of the purpose of the Consultation, include the nature of the decision being considered and a brief synopsis of both the details of the matter to be decided and of any readily identifiable impacts of a decision on the Parties;
  2. A description of the Consultation process include intended activities, timelines, expectations and limitations, if any;
  3. The Consulting Party will set out the substance of the Notice of Consultation in clear, concise and understandable language.
- d. Privacy statement  
Subject to requirements or entitlements to withhold information under section 304 of the NHPA and any other legislation relating to access to information or privacy, the comprehensive information package will contain relevant information and material facts in sufficient form and detail to assist the Consulted Party to understand the matter in order to prepare a meaningful response.
- e. A reasonable period of time will be provided to the Consulted Party to consider the matter, having regard to—
  1. the nature and complexity of the matter to be decided;
  2. the Consulted Party's need to consult, in some circumstances, with its respective constituents, citizens and other communities; and, where relevant,

3. constraints on the Consulting Party, including but not limited to statutory time frames that may apply.
- f. Upon the request of the Consulted Party, the Parties will discuss the provision of resources to the Consulted Party in order to carry out its consultations with its respective constituents and citizens and other communities with respect to its response.
- g. Where the Consulted Party has concerns related to any aspect of the Consultation process as set out in the Notice of Consultation, or if it does not have a clear understanding of the purpose and expectations for the Consultation, it will contact the designated representative of the Consulting Party as soon as practicable. Upon mutual agreement, the Parties will review options to address the concern and/or to facilitate a mutual understanding about the purpose and expectations for the Consultation.
- h. Upon the request of a Consulted Party, the Consulting Party will provide the Consulted Party with an opportunity to meet to communicate its interests and concerns and to propose options related to the matter to be decided.
- i. The Consulted Party will endeavor to provide a timely response by official Tribal Government email to the Consulting Party with respect to the matter of the Consultation, describing any concerns or recommendations the Consulted Party may have.
- j. Upon receipt of a response from the Consulted Party, within the timelines indicated in the Notice of Consultation amended as a result of deliberations pursuant to section IV.g. of this Agreement, the Consulting Party will give full and fair consideration to any views or recommendations presented by the Consulted Party and will make reasonable efforts to accommodate those views in its decision.
- k. In the event that a response is not provided within the timelines indicated in the Notice of Consultation or amended as a result of deliberations pursuant to section IV.g. of this Agreement, the Parties agree that the Consulting Party has discharged its obligation to Consult.
- l. The Consulting Party will provide written reasons to the Consulted Party for the decision made in respect of the matter for which the Consultation was initiated. Upon a request of the Consulted Party, the Consulting Party will designate appropriate representatives to meet to explain the decision and the reasons for that decision.

## **VIII. Dispute Resolution**

Should any consulting or signatory party to this Protocol object to any actions proposed or the manner in which the terms of the agreement are implemented, the NRCS State conservationist and CRS/CRC must consult with such party to resolve the objection. If the State conservationist determines that such objection cannot be resolved, either party may terminate the agreement pursuant to section X.b. of this Agreement.

## **IX. Duration of the Protocol**

- a. The Protocol will be in effect for an initial term of 5 years from the date of the last signature.
- b. The Parties may agree to extend the term of the Protocol per stipulation X.a. If a Party wishes to extend the Protocol, that Party must notify the other Party in writing, within 3 months prior to the expiration of the Protocol.

## **X. Amendment and Termination**

- a. The Protocol may be amended or extended if agreed to in writing by all signatories. The amendment will be effective on the date a copy, signed by all signatories, is filed with the Tribe,

NRCS FPO, respective SHPO and the Advisory Council on Historic Preservation, pursuant to 36 CFR Section 800.2(c)(2)(ii)(E).

b. If any signatory to this Protocol determines that its provisions will not or cannot be carried out, that party must immediately consult with the other parties to attempt to develop an amendment per stipulation X.a. If within 30 calendar days, or other time period agreed upon by the signatories, an amendment cannot be agreed upon, any signatory may terminate the agreement upon written notification to the other signatories.

## XI. Signatory Parties

The Protocol may be signed in counterparts. If signed in counterparts, the Protocol becomes effective on the date of the last signature.

State Conservationist, [NAME] Date \_\_\_\_\_  
Natural Resource Conservation Service

Tribal Chairperson [NAME],  
[NAME OF TRIBE]

Date

**State Example 5**  
**Appendix A**

**[TO CONSULTATION PROTOCOLS]**

Contact Information

State Conservationist

NRCS CRS/CRC

Tribal Chairperson

THPO

**State Example 5**  
**Appendix B**

**[TO CONSULTATION PROTOCOLS]**

**Lands of Ancestral concern (non-Tribal lands) to the [Tribe] are identified in the following:**

**Conservation practices requiring review on ancestral lands include the following:**

**Consultation process:**

## State Example 6

### **Sample Multistate Tribal Prototype Programmatic Agreement (PPA)**

#### **PROTOTYPE PROGRAMMATIC AGREEMENT BETWEEN THE US DEPARTMENT OF AGRICULTURE, [STATE OFFICES] NATURAL RESOURCES CONSERVATION SERVICE STATE OFFICES, AND THE [TRIBE] REGARDING CONSERVATION ASSISTANCE**

**WHEREAS**, the United States Department of Agriculture (USDA) Natural Resources Conservation Service (NRCS) administers numerous voluntary assistance programs, special initiatives, and grant and emergency response programs for soil, water, and related resource conservation activities available to eligible private producers, States, commonwealths, federally recognized Tribal Governments, other government entities, and other applicants for conservation assistance, pursuant to the Agricultural Act of 2014 (2014 Farm Bill, Public Law 113-79); Soil Conservation and Domestic Allotment Act of 1935 (Public Law 74-46, 16 U.S.C. Sec. 590 a-f, as amended); the Flood Control Act of 1944 (Public Law 78-534, as amended); the Watershed Protection and Flood Prevention Act (Public Law 83-566, as amended, 16 U.S.C. Sec. 1001–1012); the Agricultural and Food Act of 1981 (Public Law 97-98, 95 Stat. 1213); the Agricultural Credit Act (Public Law 95-334, Title IV, Section 403); Food, Agriculture, Conservation and Trade Act of 1990 (Public Law 101-624); the Flood Control Act of 1936 (Public Law 74-738); the Food Security Act of 1985 (Public Law 99-198, as amended); the Federal Agricultural Improvement and Reform Act of 1996 (Public Law 104-127); and executive and secretarial orders, implementing regulations and related authorities; and

**WHEREAS**, NRCS, through its conservation assistance programs and initiatives, provides assistance for activities with the potential to affect historic properties eligible for or listed in the National Register of Historic Places, including national historic landmarks (NHLs) and therefore constitute undertakings subject to review under Section 106 of the National Historic Preservation Act (NHPA), 54 U.S.C. Section 306108, and its implementing regulations, 36 CFR Part 800, including the provisions of these regulations addressing NHLs at 36 CFR Part 800.10; and

**WHEREAS**, NRCS has determined that the requirement to take into account the effects to historic properties of its undertakings may be more effectively and efficiently fulfilled through the use of a Prototype Programmatic Agreement (Prototype Agreement); and

**WHEREAS**, the NRCS [STATES] State Offices have consulted with the [TRIBE] and followed the instructions in the Advisory Council on Historic Preservation (ACHP) letter that accompanied the Prototype Agreement, dated November 21, 2014; and

**WHEREAS**, NRCS also is responsible for fulfilling the requirements of the National Environmental Policy Act (NEPA), including the use of categorical exclusions, and coordinating NEPA and section 106 reviews, as appropriate; and

**WHEREAS**, NRCS developed this Prototype Agreement in consultation with the National

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Conference of State Historic Preservation Officers (NCSHPO) and its members, interested Indian Tribes, Native Hawaiian organizations, interested historic preservation organizations, (such as the National Trust for Historic Preservation), and the ACHP; and

**WHEREAS**, in accordance with 36 CFR Section 800.14(b)(4), the ACHP has designated this agreement as a Prototype Agreement, which allows for the development and execution of subsequent prototype agreements by individual NRCS State offices (State-based Prototype Agreements) to evidence compliance with section 106; and

**WHEREAS**, this State-based Prototype Agreement conforms to the NRCS Prototype Agreement as designated by the ACHP on November 21, 2014, and therefore, does not require the participation or signature of the ACHP when NRCS State offices and the Tribal historic preservation officer (THPO) and Indian Tribe agree to the terms of the State-based Prototype Agreement; and

**WHEREAS**, this Prototype Agreement replaces the 2002 nationwide “Programmatic Agreement among the United States Department of Agriculture Natural Resources Conservation Service, the Advisory Council on Historic Preservation, and the National Conference of State Historic Preservation Officers relative to Conservation Assistance,” as amended in 2011 and 2012, which expired on November 20, 2014; and

**WHEREAS**, the NRCS State conservationists are the responsible Federal agency officials within the State for all provisions of section 106, including consultation with the SHPO and Government-to-Government consultation with Indian Tribes to negotiate the State-based Prototype Agreement; and

**WHEREAS**, the State-based Prototype Agreement does not apply to undertakings occurring on or affecting historic properties on Tribal lands, as defined by the 54 U.S.C. Section 300319 of the NHPA, without prior agreement and execution of a State-based Prototype Agreement with the concerned Indian Tribe; and

**WHEREAS**, the NRCS has consulted with [TRIBE] and has invited the [TRIBE] to enter into this State-based Prototype Agreement as a signatory; and

**WHEREAS**, this Prototype Agreement does not modify the NRCS’s responsibilities to consult with Indian Tribes on all undertakings that might affect historic properties and properties of religious and cultural significance to them, regardless of where the undertaking is located, without prior agreement by the concerned Indian Tribe, and recognizes that historic properties of religious and cultural significance to an Indian Tribe may be located on ancestral homelands or on officially ceded lands near or far from current settlements; and

**WHEREAS**, when NRCS conducts individual section 106 reviews for undertakings under this State-based Prototype Agreement, it must identify and invite other agencies, organizations, and individuals to participate as consulting parties; and

**NOW, THEREFORE**, the NRCS [States] State offices and the [TRIBE] agree that undertakings in the States of [STATES] will be implemented in accordance with the following stipulations in order to take into account the effect of the undertaking on historic properties.

### STIPULATIONS

NRCS must ensure that the following stipulations are met and carried out:



## **I. Applicability.**

- a. Once executed by the NRCS and the [TRIBE], this State-based Prototype Agreement sets forth the review process for all NRCS undertakings subject to section 106 in the States of [STATES].
- b. Execution of this State-based Prototype Agreement supersedes any existing consultation protocols with the [TRIBE] executed under the previous NRCS nationwide Programmatic Agreement, but does not replace any existing project-specific section 106 agreements (memoranda of agreement or programmatic agreements).
- c. This State-based Prototype Agreement applies only when there is a Federal preservation officer (FPO) in the NRCS National Headquarters (NHQ) who meets the Secretary of the Interior's professional qualification standards (48 FR 44716).
- d. This State-based Prototype Agreement applies only where there is staffing or access to staffing (through contracted services or agreements with other agencies or Indian Tribes) who meet the Secretary of Interior's professional qualification standards in the [STATES] NRCS State offices.

## **II. Roles and Professional Qualifications.**

- a. The NRCS [STATES] State conservationists are responsible for oversight of its performance within their respective States under this State-based Prototype Agreement.
- b. NRCS [STATES] must ensure all NRCS staff or individuals carrying out section 106 determinations of eligibility and effect on its behalf, including the NRCS [STATES] State cultural resources specialists (CRSs) or archaeologists are appropriately qualified to coordinate the reviews of resources and historic properties as applicable to the resources and historic properties being addressed (site, building, structure, landscape, resources of significance to Indian Tribes, and other concerned communities). Thus, these staff and consultants must meet the Secretary of the Interior's professional qualification standards and have the knowledge to assess the resources within an undertaking's area of potential effects (APE).
- c. The NRCS [STATES] State conservationists are responsible for Government-to-Government consultation with the [TRIBE] leader and/or their THPO. These responsibilities may not be delegated to any other staff or carried out on behalf of NRCS by another Federal agency.
- d. The NRCS [STATES] CRSs, archaeologists, professional consultants, or State cultural resources coordinators (CRCs) will provide technical historic property and resource information to the State conservationist for use in section 106 findings and determinations, after appropriate consultations with the respective SHPOs, Indian Tribes, and discussions with the landowner. The CRSs, archaeologists or CRCs will monitor and oversee the work and reporting of all NRCS field office personnel and professional service consultants. The CRSs and archaeologists will also assist the State conservationist in determining whether an undertaking has the potential to affect historic properties, triggering section 106 review, pursuant to 36 CFR Part 800.3(a).
- e. NRCS field office personnel involved in implementing this State-based Prototype Agreement, after completion of NRCS's web, classroom, and field awareness training acquired through USDA's AgLearn training site (Cultural Resources Training Modules 1-9), will work with State CRSs, archaeologists, and/or CRCs, as feasible and appropriate to the respective State, in completing historic preservation compliance (section 106) field records for the agricultural producer's (NRCS's client or voluntary applicant for assistance) files and for use in producing initial historic property identification

records (as set forth and outlined in NRCS's operational guidance, Title 190, National Cultural Resources Procedures Handbook, Part 601).

f. A CRS will oversee development of the scopes of work for investigation of the APEs for identified undertakings (see 36 CFR Sec. 800.4). The NRCS may use professional service contractors or consultants or partners to assist with cultural resources compliance studies. NRCS must ensure these contractors meet the Secretary of Interior's professional qualifications standards.

g. NRCS remains responsible for all consultation with the [TRIBE], SHPOs, Indian Tribes and THPOs, and all determinations of NRHP eligibility and effect. NRCS may not delegate consultation for findings and determinations to professional services consultants, producers, or applicants for conservation assistance.

h. The [TRIBE], if provided sufficient data on a proposed undertaking and APE for the proposed undertaking by a signatory NRCS State office, will consult and provide a response to the NRCS State office within 30 calendar days of receipt. The definition of sufficient data is provided in 36 CFR Part 800.11.

i. The ACHP will provide technical guidance, participate in dispute resolution, and monitor the effectiveness of this agreement, as appropriate.

### **III. Training.**

a. NRCS must require personnel conducting initial cultural resources field and office reviews to complete, at a minimum, the NRCS web-based (in USDA AgLearn) and field Cultural Resources Training modules 1-9.

b. NRCS must require CRS/CRC and/or other NRCS personnel conducting evaluations or overseeing cultural resource work to take the NRCS Cultural Resources Training modules 1-9 and the ACHP's section 106 *Essentials* course, or a course with similar content, if approved by the NRCS FPO. Training must be completed within the first calendar year after execution of this State-based Prototype Agreement. NRCS personnel must review and update training completion with their supervisors and include their training in their individual development plans.

c. NRCS may invite the [TRIBE] THPO or staff to participate in or provide training materials for presentations at agency classroom or field trainings.

d. NRCS must encourage all personnel conducting or overseeing cultural resources work to take additional appropriate specialized training as provided by the SHPO, Indian Tribes, the ACHP, National Park Service, General Services Agency, or other agencies, as feasible.

### **IV. Lead Federal Agency.**

a. For any undertaking for which the NRCS is the lead Federal agency for section 106 purposes per 36 CFR Section 800.2(a)(2), NRCS staff must follow the terms of this State-based Prototype Agreement. For cultural resource surveys, NRCS must notify the [TRIBE] of its involvement in the undertaking and the involvement of the other Federal agencies when applicable.

b. For any undertaking for which the NRCS is not the lead Federal agency for section 106 purposes, including those undertakings for which the NRCS provides technical assistance to other USDA or

other Federal agencies, the terms of this State-based Prototype Agreement do not apply to that undertaking. If the lead Federal agency agrees, NRCS may follow the approved alternative procedures in place for that agency.

## **V. Review Procedures.**

a. NRCS has consulted with the [TRIBE] and identified general NRCS activities where section 106 doesn't apply (APPENDIX A), general areas of ancestral lands interest and time periods of concern (APPENDIX B), and specific locations likely to contain properties of religious and cultural significance (APPENDIX C). The NRCS State offices will utilize information within the appendices and follow the review procedures as set forth in the flow chart in appendix D. This flow chart will be further explained in the following:

1. When an NRCS practice or activity is proposed, NRCS will review the list of activities in which section 106 (NHPA) doesn't apply in APPENDIX A of this agreement and review respective State procedures for individual practices to determine if the project has the potential to affect historic properties, if such properties were present.
  - i. If not an undertaking with the potential to affect historic properties, no further consultation with the [TRIBE] is required.
  - ii. If an undertaking with the potential to affect, continue to the next step.
2. NRCS will review locations of ancestral lands interest listed in APPENDIX B.
  - i. If the project is not located in an area identified in APPENDIX B, no further consultation with the [TRIBE] is required.
  - ii. If an undertaking with the potential to affect historic properties is located within an area of interest in APPENDIX B, continue to the next step.
3. NRCS will determine whether known sites are near the APE, consider consultation concerns, and environmental and cultural conditions, then determine if the undertaking requires a cultural resources survey by a CRS.
  - i. If NRCS determines a survey is required, NRCS will have a survey conducted.
  - ii. If NRCS determines no survey is required, they will check APPENDIX C to see if the project area is located within an area of special considerations.
    - If the project is not located in an area identified in APPENDIX C, no further consultation with the [TRIBE] is required.
    - If an undertaking with the potential to affect historic properties is located within an area of interest in APPENDIX C, NRCS will consult with the [TRIBE] and determine whether a survey is recommended. If NRCS determines no survey is required, they will notify the [TRIBE] of their decision and rationale for not conducting a survey.
4. Survey conducted.

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- i. No cultural resources located, NRCS will send a letter or email to the [TRIBE] stating the survey was negative.
- ii. Cultural resources located. Are cultural resources within the area and time period of interest listed in APPENDIX B?

- If no, NRCS will send a letter or email to the [TRIBE] stating the survey identified resources outside their defined areas of interest.
- If yes, consultation with the [TRIBE] is required.

b. Areas of ancestral lands, associated time periods and/or special cultural considerations found in APPENDIXES B & C may be modified in individual States through consultation and written agreement between the NRCS State conservationist and the [TRIBE] without requiring an amendment to this Prototype Programmatic Agreement. Modifications to APPENIX B & C in multiple States will occur through consultation and written agreement between the NRCS regional conservationists and the [TRIBE] without requiring an amendment to this Prototype Programmatic Agreement. Copies of all modifications will be sent to the NRCS FPO and ACHP.

c. When submitting applicable cultural resource survey reports, NRCS may provide its proposed APE, identification of historic properties and/or scope of identification efforts, and assessment of effects in a single transmittal to the [TRIBE], provided this documentation meets the substantive standards in 36 CFR Section 800.4-5 and 800.11.

1. The NRCS must attempt to avoid adverse effects to historic properties whenever possible; where historic properties are located in the APE, an NRCS CRS must describe how it proposes to modify, buffer, or move the undertaking to avoid adverse effects to historic properties.

2. Where the NRCS proposes a finding of “no historic properties affected” or “no adverse effect” to historic properties, the [TRIBE] will have 30 calendar days from receipt of this documented description and information to review it and provide comments. The NRCS must take into account all timely comments.

i. If the [TRIBE], or another consulting party, disagrees with NRCS’s findings and/or determination, it must notify the NRCS within the 30-calendar-day time period. The NRCS must consult with the [TRIBE] or other consulting party to attempt to resolve the disagreement. If the disagreement cannot be resolved through this consultation, NRCS must follow the dispute resolution process in stipulation VIII below.

ii. If the [TRIBE] does not respond to the NRCS within the 30-calendar-day period and the NRCS receives no objections from other consulting parties, or if the [TRIBE] concurs with the NRCS’s determination and proposed actions to avoid adverse effects, the NRCS must document the concurrence or lack of response within the review time noted above, and may move forward with the undertaking.

3. Where a proposed undertaking may adversely affect historic properties, NRCS must consult with the [TRIBE] and describe proposed measures to minimize or mitigate the adverse effects, and follow the process in 36 CFR Section 800.6, including consultation with other consulting parties and notification to the ACHP, to develop a memorandum of agreement to resolve the adverse effects. Should the proposed undertaking have the potential to adversely affect a known NHL, the NRCS must, to the maximum extent possible, undertake such planning and

actions that may be necessary to minimize harm to the NHL in accordance with 54 U.S.C. Section 306107 of the NHPA and 36 CFR Section 800.6 and 800.10, including consultation with the ACHP and respective National Park Service regional National Historic Landmark Program coordinator to develop a memorandum of agreement.

d. In those cases where similar classes of undertakings can be handled in a routine manner, the respective State conservationists and the [TRIBE] THPO may develop or modify standard treatments in APPENDIX F through consultation and written agreement without requiring an amendment to this Prototype Programmatic Agreement.

## **VI. Emergency and Disaster Management Procedures (Response to Emergencies).**

a. When relevant, NRCS must notify the [TRIBE], SHPO, and other Indian Tribes immediately or within 48 hours of the emergency determination, following the NRCS's EWP final rule (see section 216 of Public Law 81-516 Final Rule, 7 CFR Pt. 624 (April 2005)).

b. Individual NRCS State office must prepare procedures for exigency (following the rules for NRCS's EWP regarding immediate threat to life and property requiring, response within 5 days) in consultation with the [TRIBE], SHPOs, and other Indian Tribes. These procedures may be event and State-specific and may be developed or modified in APPENDIX G through consultation and written agreement between the applicable NRCS State conservationists and the [TRIBE] THPO without requiring an amendment to this Prototype Programmatic Agreement.

c. If a NRCS State office has not developed specific procedures (i.e., emergency recovery plan) for responding to exigencies, the NRCS must follow the recently approved guidelines for Unified Federal Review issued by the Department of Homeland Security (DHS) Federal Emergency Management Agency (FEMA), the Council on Environmental Quality (CEQ), and the ACHP in July 2014, or the procedures in 36 CFR Section 800.12(b).

## **VII. Postreview Discoveries of Cultural Resources or Historic Properties and Unanticipated Effects to Historic Properties.**

a. When applicable (stipulation V), where construction has not yet begun and a cultural resource is discovered after section 106 review is complete, the NRCS must consult to seek avoidance or minimization strategies in consultation with the [TRIBE], SHPO, and other Indian Tribes, and/or to resolve adverse effects in accordance with 36 CFR Section 800.6.

b. The NRCS must ensure that every contract for assistance includes provisions for halting work and construction in the area when potential historic properties are discovered or unanticipated effects to historic properties are found after implementation, installation, or construction has begun. When such a discovery occurs, the producer who is receiving financial assistance or his or her contractor must immediately notify the NRCS State conservationist's office, CRS or CRC, supervisory NRCS personnel for the area, and the landowner-applicant.

1. NRCS CRS must inspect the discovery within 24 hours, if weather permits, and in consultation with the local NRCS official (field office supervisor or district or area conservationist), concerned Indian Tribes, the SHPO, the NRCS State engineering or program supervisor, as appropriate, the landowner or producer (whomever NRCS is assisting), the CRS must establish a protective buffer zone surrounding the discovery. This action may require

inspection by Tribal cultural resources experts in addition to the CRS.

2. All NRCS contact with media may occur only under the direction of the NRCS public affairs officer, as appropriate, and the State conservationist. If a resource sensitive to the [TRIBE] is identified, they will also be consulted prior to media information being released.

3. Security must be established to protect the resources and historic properties, workers, and private property. Local law enforcement authorities must be notified in accordance with applicable State law and NRCS policy in order to protect the resources. Construction and/or work may resume outside the buffer only when the State conservationist determines it is appropriate and safe for the resources and workers.

4. NRCS CRS or CRC must notify the [TRIBE], SHPO, and other concerned Indian Tribes and the ACHP no later than 48 hours after the discovery and describe NRCS's assessment of the National Register eligibility of the property, as feasible and proposed actions to resolve any adverse effects to historic properties. The eligibility determination may require the assessment and advice of concerned Indian Tribes, the SHPO, and technical experts (such as historic landscape architects) not employed by NRCS.

5. Consulting parties and the ACHP must respond within 48 hours of receipt of the notification with any comments on the discovery and proposed actions.

6. NRCS must take any comments provided into account and carry out appropriate actions to resolve any adverse effects.

7. NRCS must provide a report to the consulting parties and the ACHP of the actions when they are completed.

c. When human remains are discovered, the NRCS must follow all applicable Federal, Tribal, and State burial laws and ordinances, including the Native American Graves Protection and Repatriation Act and implementing regulations, when on Tribal or Federal lands, and related human rights and health statutes, where appropriate. NRCS must also refer to the ACHP's Policy Statement regarding *Treatment of Burial Sites, Human Remains and Funerary Objects* and the ACHP's Section 106 Archaeology Guidance. NRCS must also follow USDA and NRCS policy on treatment of human remains and consultation.

## **VIII. Dispute Resolution.**

a. Should any consulting or signatory party to this State-based Prototype Agreement object to any actions proposed or the manner in which the terms of the agreement are implemented, the NRCS FPO, applicable State conservationist and CRS/CRC must consult with such party to resolve the objection. If the applicable State conservationist determines that such objection cannot be resolved, he or she will—

1. Forward all documentation relevant to the dispute, including the State conservationist's proposed resolution, to the NRCS FPO and senior policy official (SPO; the NRCS deputy chief for science and technology) and the ACHP. The ACHP must provide the FPO, SPO, and State conservationist with its advice on the resolution of the objection within 30 days of receiving adequate documentation. Prior to reaching a final decision on the dispute, NRCS must prepare a written response that takes into account any timely advice or comments regarding the dispute from

the ACHP and any signatory or consulting parties, and provide them with a copy of this written response. NRCS will then proceed according to its final decision.

2. If the ACHP does not provide its advice regarding the dispute within the 30-day time period, NRCS may make a final decision on the dispute and proceed. Prior to reaching such a final decision, NRCS must prepare a written response that takes into account any timely comments regarding the dispute from the signatories and consulting parties, and provide them and the ACHP with a copy of the written response.

b. The NRCS [STATES] offices responsibility to carry out all other actions subject to the terms of this agreement that are not the subject of the dispute remains unchanged.

c. Any consulting party to State-based Prototype Agreement may request the ACHP provide its advisory opinion regarding the substance of any finding, determination, or decision regarding compliance with its terms.

d. At any time during the implementation of the State-base Prototype Agreement, a member of the public may submit an objection pertaining to this agreement to an NRCS State conservationist, in writing. Upon receiving such an objection, the State conservationist must notify the NRCS SPO, FPO, and the [TRIBE]; take the objection into account; and consult with other consulting parties as appropriate to resolve the objection. The applicable NRCS State conservationist must notify the SPO, FPO, and [TRIBE] of the outcome of this process.

## **IX. Public Involvement.**

Each NRCS State operates under the section 106 regulations or alternate procedures in State-based prototype programmatic agreements. There are public involvement requirements in both the section 106 process and in the development of State-based prototype programmatic agreements. NRCS will also discuss the development of this agreement at respective State technical committee meetings.

## **X. Annual Reporting and Monitoring.**

a. Every year following the execution of this agreement, commencing December 1, 2018, until it expires or is terminated, the NRCS [STATES] State offices must provide the FPO a summary report detailing work undertaken pursuant to its terms, including a listing of cultural resource survey reports submitted to the [TRIBE]; a summary of the nature and content of meetings held with [TRIBE]; and an assessment of the overall effectiveness of the State-based Prototype Agreement. Such report must include any scheduling changes proposed, any problems encountered, and any disputes and objections received in NRCS's efforts to carry out the terms of this agreement.

1. The NRCS FPO must use the State reports to provide, through the NRCS SPO, an annual report to the ACHP.

2. The State conservationist must use the State report to assess, in consultation with the [TRIBE], the need for annual meetings with the [TRIBE] each fiscal year.

b. The State conservationist will participate in an annual review with the NRCS regional conservationist regarding the effectiveness of the prototype agreement and submit a written (email) report following this review to the SPO (deputy chief for science and technology) and FPO.

c. The NRCS State conservationist or [TRIBE] may request that the ACHP participate in any annual meeting or agreement review.

## **XI. Compliance With Applicable State Law and Tribal Law (When on Tribal Lands).**

NRCS must comply with relevant and applicable State law, including permit requirements on State land, and with applicable Tribal law, when on Tribal lands.

## **XII. Duration of Prototype Agreement.**

This State-based Prototype Agreement will be in effect for 10 years from the date of execution unless amended or terminated pursuant to stipulation XIII below.

## **XIII. Amendment and Termination.**

a. This State-based Prototype Agreement may be amended if agreed to in writing by all signatories. The amendment will be effective on the date a copy, signed by all of the signatories, and is filed with the NRCS FPO, SPO, and the ACHP.

b. If any signatory to this State-based Prototype Agreement, or the ACHP, determines that its provisions will not or cannot be carried out, that party must immediately consult with the other parties to attempt to develop an amendment per stipulation XII.A. If within 30 calendar days, or other time period agreed upon by the signatories, an amendment cannot be agreed upon, any signatory or the ACHP may terminate the agreement upon written notification to the other signatories.

c. If this State-based Prototype Agreement is terminated, or expires without being extended by the amendment process described above, and prior to continuing work on any undertaking, NRCS must comply with 36 CFR Part 800 for all applicable individual undertakings in the States of [STATES].

d. NRCS will consider requests from other USDA agencies to become a signatory to the State-based Prototype Agreement following formal written requests and appropriate discussion with and approval by the NRCS FPO and SPO, [TRIBE], and joint USDA agency-NRCS State office consultation with the ACHP, NCSHPO, and Indian Tribes and THPOs or NHOs, and other consulting parties, as appropriate. Such inclusion of the USDA agency may require amendment to this State-based Prototype Agreement.

Execution of this State-based Prototype Agreement by the NRCS and the [TRIBE] and implementation of its terms evidence that NRCS has taken into account the effects of its undertakings in the States of [STATES] on historic properties and afforded the ACHP a reasonable opportunity to comment.

## **Signatory Parties**

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Tribal Chairman or THPO, [TRIBE]



[The NRCS signatories may vary depending upon the number of States and/or regions. The NRCS signatories must be regional conservationists or higher.]

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NRCS Representatives

## **Invited Signatories**

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Advisory Council on Historic Preservation Chairman

## **State Example 6**

### **Appendix A**

#### **[Sample Multistate Tribal Prototype Programmatic Agreement (PPA)]**

##### **LIST OF ACTIVITIES REQUIRING NO FURTHER SECTION 106 REVIEW BY NRCS**

The NRCS provides conservation assistance through categories of programs or activities that by definition (36 CFR Sec. 800.1 6(y)) are generally considered undertakings. Pursuant to stipulation V.a. above, in consultation with the [TRIBE], the NRCS, through the qualified staff as described in stipulation II.b., have determined that several broad categories of NRCS activities or programs may be undertakings but section 106 does not apply because they have little or no potential to affect historic properties. Therefore, NRCS is not required to consult further with the [TRIBE] under section 106 for any activity that is included in the following:

- A. Advice or conservation technical assistance (CTA), including the development, review and/or completion of conservation plans or technical designs, when NRCS provides no financial assistance for their implementation or otherwise exercises no control over implementation (for example, design advice from the NRCS National Handbook of Conservation Practice Standards for a farm pond that is installed, independently by the agricultural producer with his or her own funds and a private contractor). When known to the NRCS, the agency will advise the producer when proposed practices that are to be installed without any Federal assistance appear to have the potential to affect historic properties and provide the names of possible contacts (e.g., the SHPO and THPO) who may provide guidance on identifying and protecting historic properties. Additionally, the plan will advise the producer that State, local or Tribal cultural resources, historic preservation or State burial laws may apply. The producer may use these data if he or she decides to implement the conservation plan without NRCS financial assistance.
- B. Technical determinations based upon empirical or factual findings and determinations of compliance or noncompliance including, but not limited to, wetlands determinations, determinations of highly erodible land, certification of the existence of a wetland or highly erodible land, determination of prime and unique farmland, and the like.
- C. Analyses of data from technical determinations or resource inventories, including but not limited to Soil Survey (7 CFR Pt. 611), Snow Survey and Water Supply Forecasts (7 CFR Pt. 612), Plant Materials for Conservation recommendations (7 CFR Pt. 613), River Basin Studies under Section 6 of Public Law 83-566 (7 CFR Pt. 621); NRCS A-3A 75-2-64 10.
- D. Development or revision of technical standards and specifications.
- E. Changes or amendments to approved actions when the NRCS State office, in consultation with the [TRIBE], concur that such changes have no potential to affect National Register eligible properties.

- F. Resource inventory, monitoring, field trials, and other information gathering activities that do not involve subsurface disturbance.
- G. Conservation easement purchases, the management plans for which do not call for structural modification or removal or ground disturbing activities.
- H. National Resources Inventory (NRI) and National Cooperative Soil Survey program activities that involve no ground disturbance or are limited to small-scale field investigations such as small shovel holes, auger holes, probe holes, and/or core holes. Larger-scale field investigations such as soil investigation pits, however, may have the potential to affect historic properties.
- I. Programs of study under the authority of Public Law 83-566, as amended (implemented through 7 CFR Pt. 621), specifically: River Basin Studies, Floodplain Management Studies, and Natural Resource studies.

**State Example 6**  
**Appendix B**

TRIBAL [IF INCLUDING TRIBAL LANDS] AND ANCESTRAL LANDS AND TIME PERIODS OF  
INTEREST TO THE [TRIBE]

**[LIST RESIDENT STATE/TRIBAL LANDS]:**

Counties:

Periods of Concern: (All, Prehistoric, or Historic)

[May vary for relocated or resident Tribes]

**[LIST ANCESTRAL STATES]:**

Counties:

Periods of Concern: (All, Prehistoric, or Historic)

**State Example 6**  
**Appendix C**

Locations of special concern to the [TRIBE]. Maps provided [may be hardcopy or electronic].

[Areas of known cultural sensitivity. Buffers may be applied to protect exact location.]

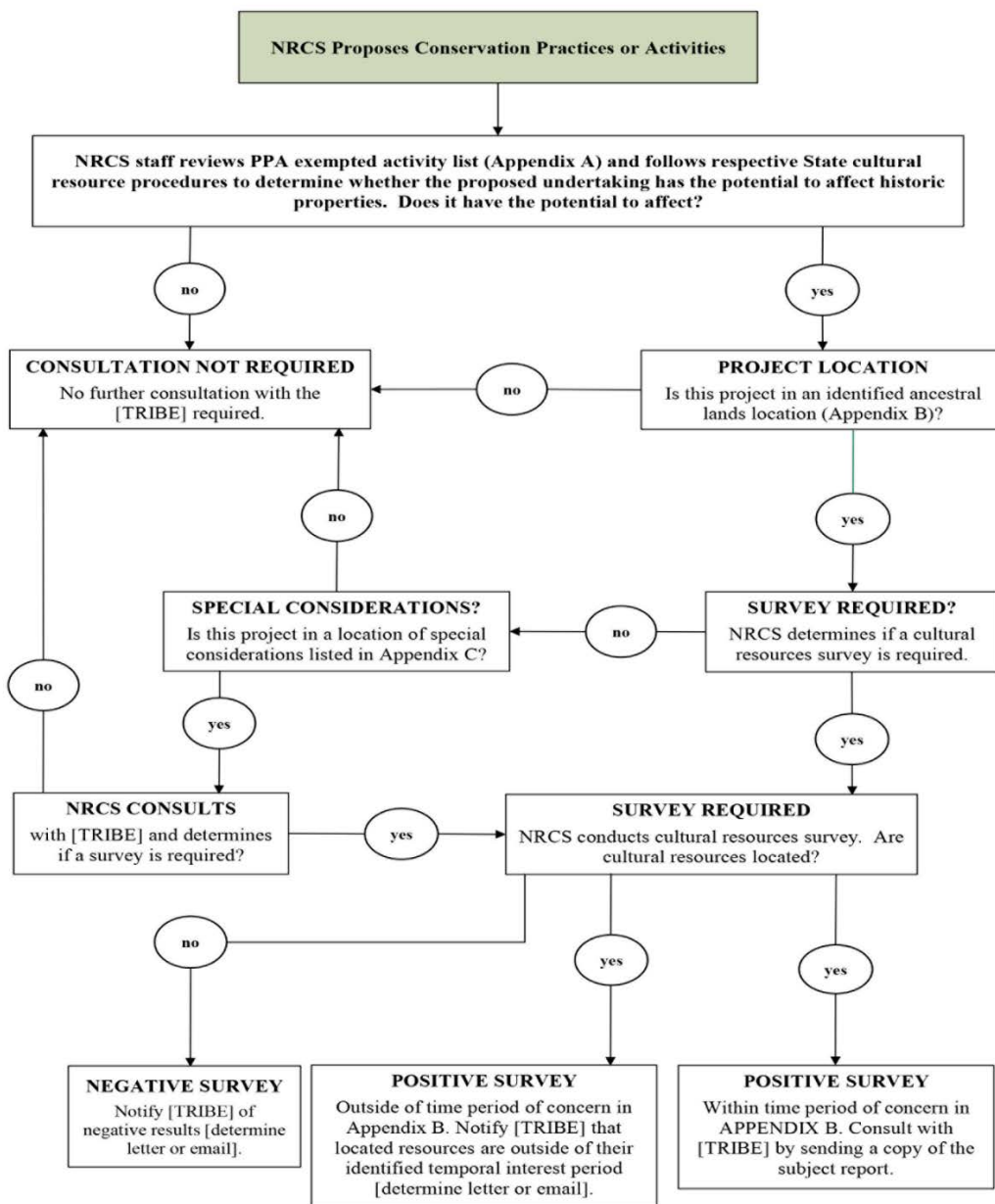
EXAMPLES:

New ground-disturbing activities within ¼ mile of the Trail of Tears.

New ground-disturbing activities or significant visual effects within 1 mile of *Making This Up Butte*.

**State Example 6  
Appendix D**

**CULTURAL RESOURCE REVIEW FLOW CHART**



**State Example 6**  
**Appendix E**

**GLOSSARY OF ACRONYMS USED IN THIS DOCUMENT**

USDA	United States Department of Agriculture
NRCS	Natural Resources Conservation Service
ACHP	Advisory Council on Historic Preservation
NHL	national historic landmark
NRHP	National Register of Historic Places
SHPO	State historic preservation officer
THPO	Tribal historic preservation officer
NHO	Native Hawaiian Organization
NEPA	National Environmental Policy Act
CEQ	Council on Environmental Quality
DHS	Department of Homeland Security
FEMA	Federal Emergency Management Agency
NHPA	National Historic Preservation Act
FPO	Federal preservation officer
SPO	senior policy official (NRCS)
NHQ	National Headquarters (NHQ)
APE	area of potential effect—from ACHP regulations 36 CFR Part 800
CRC	cultural resource coordinator (the NRCS staff member officially designated by the State conservationist as the point of contact for addressing compliance with the NHPA and related authorities).
CRS	cultural resources specialist (NRCS—meets Secretary of Interior’s professional qualification standards, generally an archaeologist or historian)
EWP	Emergency Watershed Protection Program (NRCS program)

**State Example 6**  
**Appendix F**

**STANDARD TREATMENTS (RESERVED)**



**State Example 6**  
**Appendix G**

**EMERGENCY PROCEDURES (RESERVED)**

**State Example 7**

**Sample State-based Tribal Prototype Programmatic Agreement (PPA)**

NRCS currently has several Tribal PPAs and is working on more. Tribal PPAs can be located on the following web page:

<http://www.achp.gov/nrcs.html>